88-626 ③

No. 88-[redacted]

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

vs.

DALE L. HODDER,
Respondent.

APPENDIX TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

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APPENDIX A

SELECTED GOODYEAR DOCUMENTS

CONFIDENTIAL MEMORANDUM

June 11, 1970

To: Mr. E. K. Ellsworth

cc: Mr. R. J. Derleth Mr. J. F. Hutchinson (Akron)
Mr. J. H. Golata Mr. G. L. Gerbeth (Akron)
Mr. P. W. Fair

Re: Memorandum on meeting in
Washington, D. C., on
June 8, 1970 - Office of
Department of Transportation

At the request of Mr. Roman L. Brooks, Safety Standards Engineer in the D.O.T. Office, an informal meeting was held for the purpose of acquainting the Department of Transportation people with rim and wheel designs where loose parts are involved (i.e., truck wheels and rims).

In attendance at the meeting for Goodyear, were:

J. F. Hutchinson, Director of Product Quality & Safety
G. L. Gerbeth, Manager Product Design & Development - MPD
R. J. Burns, writer of this memorandum

Present for Department of Transportation, were:

Joe H. Clark, Jr., Chief of Defects Division
Joe O'Gorman, Chief, Division of Testing

M. Jack Lilley, Branch Chief of Division of Defects
Roman L. Brooks, Safety Standards Engineer
Jim E. Thomas, Highway Safety Management Specialist

The meeting, as stated, was quite informal but a number of very succinct questions were asked of us concerning rim design, rim tolerances, manufacturing, techniques, sources of mill sections, tolerances on mill sections, incoming inspection techniques on steel sections, rim design techniques and background, and a number of questions concerning rim and wheel assembly and usage. Typical of some of the questions asked are listed below.

* * *

Question (Clark) - Apparently something happened in '62 or '64 with your KB/KW rims that caused you to change your ideas about them and take them off the market.

Answer (Burns) - Nothing really happened - it was a commercial decision on my part as General Manager to eliminate the rim to decrease inventory and reduce setup in order to run a more competitive shop. You see, Gentlemen, the KW and KB bases are identical to the LB and LW except that the KB's and KW's have a split base and a continuous side flange, and a LB and LW are solid base rims with split side flanges.

> Further, the KB and KW can be used only on cast steel wheels while the LB and LW can be used as demountable or nondemountable, or in other words, used in the manufacture of a disc wheel.

* * *

Roman Brooks then described the Huizenga accident as he understood it. Apparently, Mr. Huizenga discovered that his right front tire was soft. Learning this, he jacked up the right rear dual assembly with the idea of removing one of the assembled tires and rims for use on the right front. For reasons not known, he removed both rims from the wheel and was in the act of remounting the rim and tire on the wheel when the assembly apparently exploded.

* * *

R. J. Burns

* * *

August 17, 1971

* * *

Aetna Life & Casualty
230 West Monroe Street
Chicago, Illinois 60606

Attention: Mr. John Schroeder

RE: Insured: Goodyear Tire & Rubber Co.
Claimant: Robert Huizenga
D/A: December 19, 1967

* * *

Gentlemen:

The depositions of Robert Huizenga and Leanne Huizenga, plaintiffs in the above case, were taken for discovery purposes on August 11th. Mr. Gerhart L. Gerbeth of Goodyear Tire & Rubber Company came to Chicago for the depositions and for a conference regarding this case at my request. Mr. Gerbeth was most helpful.

* * *

Both before and after the deposition, I conferred at some length with Mr. Gerbeth. Mr. Gerbeth is a very knowledgeable man in the field of tire rims.

Mr. Gerbeth explained to me that there are essentially three types of rims for truck tires. One is a solid rim, the second is a solid rim with a split lock ring, and the third is a split rim with a solid lock ring which is the type involved in this case.

The particular rim in this case, as you know, is a lightweight type of split rim.

Mr. Gerbeth estimates that about twenty similar cases have been filed against Goodyear. None of these cases involved either the first or second type of rims, and none of them (or perhaps only one) involved the standard gauge split rim. All of these cases resulted from split rims of the lighter weight. Mr. Gerbeth conceded quite frankly that the only reason for producing the lighter weight split rim was to achieve a lower cost item for sale. He also admits quite freely that he was instrumental in inducing the company to stop producing the lightweight split rims in 1962. Events similar to the instant case had occurred and this was a significant factor in discontinuing this product.

* * *

Ordinarily, rims of this type when they become worn or distorted should be discarded. However, the difficulty that Goodyear has been faced with, as the only producer of split rims, is the problem of warning users of this problem. You are aware that the Department of Transportation has conducted a study in this regard. We did not know that Mr. Gerbeth and other Goodyear representatives had actually gone to Washington to discuss this problem with government representatives. You are aware that Goodyear complied with the Department of Transportation request for complete background material on this type of rim design.

* * *

Yours very truly.

HINSHAW,CULBERTSON.MOELMANN.
HOBAN & FULLER

* * *

August 25, 1971

COMMENTS CONCERNING:

Metal Products
Product Planning
Product Engineering Department

1. Current Products

* * *

Drop

K-KW - Safety-rim requires extra step to insure complete lock.

* * *

OFFICE MEMO

November 30, 1972

* * *

COMPONENT PRODUCT MANAGEMENT COMMITTEE MEETING MINUTES OF MEETING HELD NOVEMBER 27, 1972

* * *

Pilliod Program for Tube Type Truck Tire Longevity

The contradiction of (1) market trend to tubeless truck tires and rims/wheels and (2) Goodyear Tire interests was reviewed. Mr. Pilliod has commanded an all-out effort to eliminate the safety hazards of multi-piece tube type truck rims so as to protect the Goodyear investment in tube type tire facilities. Requirements are:

1) No possibility of inflating assembly unless all lose [sic] rim component parts are fully engaged.
2) No possibility of disengaging loose rim components without complete deflation of tire.

One Development Engineer at Metal Products has been assigned full time to this development. Mr. Derleth emphasized the urgency of this project.

* * *

MOTOR WHEEL CORPORATION
OFFICE MEMO

Date December 11, 1972

MR. R. A. JAY
cc: C. J. Pilliod
J. F. Hutchinson
M. A. Wilson
P. W. Fair
M. J. Lincoln

Re MULTIPLE PIECE TRUCK RIMS

Prior to the October 20, 1972 meeting in Mr. Pilliod's office, Motor Wheel had been working towards one-piece, drop center, 15° truck rims to meet anticipated safety requirements. During the meeting Mr. Pilliod stated it was impossible for Goodyear to produce enough tubeless 15° tires to meet total truck requirements for many years. Motor Wheel was then charged with the task of designing multiple piece rims which would meet future safety requirements.

* * *

R. J. Derleth

MOTOR WHEEL CORPORATION
OFFICE MEMO

Date April 6, 1973

To Mr. G. Gerbeth

cc: Messrs. P. Fair T. Martin
R. M. Smith M. Lincoln
R. Derleth R. Burns

Re MULTI-PIECE TRUCK RIM/WHEEL SAFETY
REFERENCE REPORT SMITH/FAIR DATED 4/5/73

Bob Smith today presented his very comprehensive summary and analysis relating to the subject.

A conspicuous conclusion brought out in his report is that the majority of rim failures relate to the KB/KW/KWX series.

* * *

W. D. Pile

We make a vital vehicle component which is a metal product with an undefined, but limited, useful life. The parts are inherently dangerous both on the highway and in the shop. When in use the dangerous condition is often masked. We know that these parts, especially old and damaged parts, sometimes catastrophically cease to serve their intended purpose. The time at which the usefullness [sic] ceases is dependent on chance, service procedures, maintenance, proper use of tools, and the use, abuse and mis-use of which the parts have been subjected during their lifetime. When this happens, there may be a social loss and/or a property loss to the user, the involved user or to interested or disinterested bystanders and a financial loss to Goodyear.

In the eyes of the user community, the part is a secondary component. It is a sturdy, heavy part, made of steel. He, therefore, thinks it has an unlimited useful life. He does not recognize the possible dangers associated with the product. There is no significant economic reason to replace an old with a new part, other than tubeless, since there has been no improvement in the state of the art.

We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it. We do not follow up published information with personal contact to show how and the reason why.

We have expert knowledge with regard to serviceability (possibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a "good" part from a "bad". He doesn't believe the part won't function (provide support for the tire). He doesn't believe it will endanger him. Even if he feels it is unserviceable, he may not be able to replace it due to owner or his bosses instructions; or a replacement may not be available. He may be willing to take a chance because he can't afford a new rim, or he's in a hurry.

Solution: Improve level of knowledge of user regarding need for maintenance, maintenance procedures and how to determine serviceability. Eliminate the problem parts.

Why should a user discard old, bent, worn, corroded and cracked wheel/rim parts when they appear to continue to serve the purpose intended?

1. Safety

prevent social loss } but chance of
prevent liability loss } accident is small

Why should he properly maintain present parts? (remove rust, keep painted, proper use of tools)

1. Safety
2. Lengthen part life, but it takes time

Will a new part lengthen useful life of tire or vehicle? Reduce downtime? Lower operating costs? Enhance performance in any way? Improve appearance? (probably no to all of these)

Why do we care about resolving this matter?

1. Escape criticism from Arkon [sic]
2. CTA

3. Reduce liability
4. Threat of government pressure
5. Avoid bad press
6. For the good of society
7. Increase sales

What could we do?

1. Recall

or 2. Advisory to alert the public to danger by
    DOT
    Industry association
    Goodyear

or 3. Sales campaign

plus 4. Education

What would happen?

1. Any positive action to get parts out of use will probably result in more liability suits and higher damage awards, but at the same time should reduce the number of accidents.
2. An intensive sales/education campaign with first hand contact would probably result in the scrapping of more parts than advisory and may be even a recall.
3. We would have to provide replacements through our distributor organization.
4. We could be subject to criticism from our customers and others in the industry.

How could we do it?

1. Solicit advice from DOT - Sproale to handle contacts 1 on 1.
2. Discussion with others in industry - staff level contacts.
3. Counsel from Goodyear - Lincoln and Dohnal with counterparts.
4. Formulate sales/education campaign - engineering define maintenance and serviceability, sales prepare distribution program (special old or obsolete part trade-in incentive; premium awards; etc?)

Recall, advisory = 1,2,3

Sales, education campaign = 1,2,3,4

(RECEIVED
NOV 23, 1979)

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration
Washington, D.C. 20590

REGISTERED MAIL

RETURN RECEIPT REQUESTED

* * *

Mr. J. F. Hutchinson
Vice President
The Goodyear Tire and Rubber Company
Akron, Ohio 44316

Dear Mr. Hutchinson:

Over the past several months the National Highway Traffic Safety Administration (NHTSA) has been conducting an engineering analysis involving the explosive disassembly of multipiece truck and bus wheels. The analysis was initiated as a result of a review of this agency's past decisions concerning such wheels, information obtained during past defect investigations, and recently acquired data.

The purpose of this analysis was to identify any rim types which warrant recall corrective action. Our analysis focused on all types of multipiece rims and included a reassessment of the disposition of former defect investigation case 215, involving Goodyear KW, KB, and KWX wheels ("K type").

* * *

After reviewing and analyzing all of this information, we found that the "K type" rims have been involved in a significantly higher number of accidents of explosive disassembly than most other types of multipiece rims (production volume considered). * * *

All types of multipiece rims can be subject to a variety of servicing procedures, including the use of worn, corroded, or mismatched parts. When recognizing this, the significantly higher number of accidents found among "K type" rims is totally unacceptable and points toward an inherent safety defect in these rims. The Goodyear internal document, dated August 25, 1971, referenced in my letter to you of March 16, 1979, and citing the extra step required ". . . to insure complete lock" when assembling these wheels, certainly indicates that safety played a role in their discontinuance. The Goodyear catalogue printed in November 1977 and entitled, Goodyear On-Highway Rim Safety & Service Manual, also cites their ". . . unique configurations that deserve special mention."

The high number of accidents found among "K type" rims is reflected in the data which Goodyear provided under this analysis. Moreover, the conclusions about the unique danger associated with these rims are well documented by others closely associated with multipiece wheels. Some of these documents can be found in the current NHTSA rulemaking docket on this subject.

In view of the foregoing, I strongly recommend that Goodyear voluntarily initiate a recall and remedy campaign to remove the remaining "K type" rims from service. Postitive action now will not only preclude further accidents, injuries, and deaths, but also obviate the delay in and the necessity of further investigative effort and the scheduling of administrative enforcement proceedings.

Under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, Goodyear is hereby requested to notify me within seven (7) working days from receipt of this letter whether it will conduct a safety recall.

* * *

Sincerely,

Lynn L. Bradford
Acting Director
Office of Defects Investigation
Enforcement

* * * 12-19-79

CUSTOMER LETTER

Subject: Goodyear's Voluntary Recall of "K" Type Multi-Piece Rims

The National Highway Traffic Safety Administration and The Goodyear Tire & Rubber Company have conducted surveys and analyses of accidents involving the separation of "K" type rims resulting in a number of deaths and injuries, specifically to persons mounting, dismounting and otherwise servicing multi-piece rim and wheel assemblies.

* * *

The NHTSA has advised Goodyear that its analysis indicates a significantly higher number of accidents among "K" type rims than other types of multi-piece rims.

* * *

In view of the in service age of the "K" type rims and the aforementioned findings of the NHTSA and The Goodyear Tire & Rubber Company, Goodyear has determined to recall all "K" type multi-piece rims from service without regard to production dates or date of purchase by the user.

* * *

If you have any "K" type rims on your vehicles or in stock, please call the closest Goodyear Truck or Farm Tire Center for replacement

* * *

We are taking this action in the interest of motor vehicle safety and in the interest of your personal safety.

* * *

Sincerely,

Vice President

J F Hutchinson

* * *

May 7, 1979

Messrs: W L Sweatt
E H Sellars
L Beckman
M C Jenison
R A Nouza
J Rumel

Subject: OSHA Rulemaking - Servicing Multi-Piece Rim Wheels

Attached to each is a copy of a proposed OSHA Standard for the servicing of multi-piece rim wheels fitted on vehicles used on and off highways.

* * *

This proposed OSHA Standard is the result of industry (wheel manufacturers) pressure on OSHA to promulgate a standard which would put the product liability onus on the people who service multi-piece rim wheels and hopefully minimize the manufacturer's exposure to product liability claims and actions arising out of multi-piece rim wheel failures and explosions resulting from improper servicing procedures.

* * *

Attorney

T D Caine

* * *

cc: S H Buzby
J F Hutchinson
Max Lincoln
Ken Betzler

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 793068

DALE L. HODDER,
and
TERRY D. HODDER and
JEANETTE R. HODDER,
Plaintiffs,
vs.
THE GOODYEAR TIRE & RUBBER COMPANY,
an Ohio Corporation,
and
PIONEER RIM & WHEEL COMPANY, a Minnesota
Corporation,
Defendants.

COMPLAINT

Comes now the Plaintiffs, and for their claim against the Defendants, state as follows:

1. Plaintiffs are individual residents of Boy River, Minnesota; Defendant Goodyear Tire & Rubber Company (hereinafter "Goodyear") is a foreign corporation with district offices located in Minneapolis, Hennepin County, Minnesota, and which has appointed the C.T. Corporation Systems, Minneapolis, Minnesota, as its registered agent for service of process, so that Defendant Goodyear

resides in Hennepin County, Minnesota; Defendant Pioneer Rim & Wheel Company is a Minnesota corporation with its offices and sales outlet located at 404 Industrial Boulevard, Minneapolis, Minnesota, so that said Defendant is a resident of Hennepin County, Minnesota.

2. On or about December 19, 1981 Plaintiff Dale L. Hodder was employed at a gas station in Remer, Minnesota and was attempting to mount a Goodyear KWX-KW split rim assembly on the axle of an International Harvester logging truck when it suddenly and unexpectedly exploded in Plaintiff's face causing severe, permanent and progressive injuries to his face, head, brain, eyes, mouth, teeth, soft tissues and other parts of his body.

3. At the time of the design, manufacture, distribution and sale of the K-type split base assembly by Goodyear the rim was defective in that it had a proclivity to blow apart and explode when put to the use intended and anticipated, which proclivity was known to Defendant and the product was defective in that Defendant failed to warn or instruct of the defects, the mounting and handling procedures and the fact that the rim was obsolete and considered dangerous by Goodyear so that it should not be used or handled and was further defective in failing to conform to specifications and contained manufacturing, processing and material defects which caused the parts to fit improperly, mismatch, wear and otherwise become unsafe.

4. At the time of Plaintiff Dale L. Hodder's injury the split K-type rim assembly was in substantially the same condition as when designed, manufactured, sold and distributed by Defendant and was used by Plaintiff in the manner in which the product was reasonably in-

tended to be used and as to which Defendant Goodyear anticipated its use, i.e., to hold and contain an inflated truck tire, and because of the aforesaid defects in the design, manufacture, material, instruction and warning concerning the K-type split rim assembly it exploded and permanently injured the Plaintiff.

5. At the time of the design, development, manufacture, distribution, licensing and sale of the subject K-type rim assembly and prior to Plaintiff's injuries, Defendant knew or reasonably should have known that the design, configuration, materials and construction of the K-type rim components presented an extreme and unusual hazard to the motoring public, to truck owners and users including anyone attempting to mount, inflate, handle, store or transport an inflated K-type rim assembly and with such knowledge Defendant Goodyear negligently, willfully, recklessly, fraudulently and intentionally disregarded the safety of the Plaintiff and the public in the following respects:

a. Ignored positive locking devices invented by Goodyear engineers in 1923 and subsequently;

b. Manufactured, distributed and sold K parts as the only domestic manufacturer of truck wheels which designed and promulgated the assembly, knowing it to be extremely hazardous;

c. Failed to recall, retrofit or warn on rim parts following the 1970-73 investigation by the Office of Defects Investigations, National Highway Traffic Safety Administration in which investigation the safety hazard of the rim was reported and documented;

d. Refused in 1971 and previously to drop the K-type rim for safety because it required an extra step to lock, according to Goodyear rim engineering;

e. Failed to warn that rims 10 years old and older are extremely hazardous and have caused numerous accidents resulting in persons being killed, blinded and maimed all over the country by the K-type assembly;

f. Attempting to exchange rims at customers' expense in a safety exchange program in which the owner of the rim was required in 1977 and 1978 to pay 90 percent of the retail price of the replacement rim while Goodyear continued to profit in the sale of the replacement rim;

g. Failed to warn of the reputation and hazards of the rim in spite of knowledge that the rim was known by experienced tire changers as "the suicide rim" and known by Goodyear product liability lawyers and insurers as "treacherous to defend" and having a "shady reputation";

h. Failing to publicize the fact that all K-type rims as of October 6, 1979 are of sufficient age as to present an extreme safety hazard while representing to the motoring public and NHTSA that rims last the life of the vehicle or longer;

i. Misrepresenting in the safety film *You May Not Get A Second Chance* that the K-type rim is an acceptable and available rim component which can be safely assembled, knowing such representations to be false;

j. Representing in Goodyear rim catalogs that the K-type rim is or may be available and is a viable and acceptable rim component for current purchase and use, and at the same time attempting through an unpublicized safety exchange program to retire K-type rims from service;

k. Suppressing the usage of proposed instruction and warning labels to be affixed to rim parts in order to avoid product liability exposure and embarrassment in the courtroom thereby protecting Goodyear corporate interests and profits at the expense of life and limb;

l. Suppressing the single-piece drop center safety rim and failing to develop and promote the sale of it in order to protect Goodyear's corporate investment in the tube-type bias truck tire manufacturing equipment and plants, thereby protecting Goodyear corporate interests and profits at the expense of life and limb;

m. Misrepresented facts concerning the K-type rim in the 1970-1973 and 1978-1981 defects investigations of the K-type rim by the Department of Transportation;

n. Failed to undertake a consumer notification campaign at the time the engineering analysis investigation of the K-type rim was opened in October, 1978 and stalling the inevitable recall of the K-type rim to obtain concessions from the Department of Transportation, National Highway Traffic Safety Administration which would:

1. Require the public to bear more than half the cost of the recall, and

2. Derive an acknowledgement from the NHTSA that the Goodyear L-type split ring was a safe substitution at a time when the L-type rim is also under investigation;

o. Establishing and utilizing a political slush fund maintained initially in a bank in Zurich, Switzerland under the code name "Goyeda" in excess of $1,000,000.00 utilized for illegal purposes including the avoidance of a government investigation, discontinuance of production and recall campaign of the K-type rim, including but not limited to $40,000.00 cash payment made to the Finance Committee to Re-elect the President of the United States, Richard Nixon, in 1972 for the purpose of influencing the safety regulations relating to multi-piece rims and aborting a spirited investigation at the NHTSA then pending while swearing falsely to the Senate Select Committee on Presidential Campaign Activities known as the Ervin Committee and to the Watergate Special Prosecution Force and the Securities and Exchange Commission that no such investigation was pending at the time of the slush fund payments.

6. At the time of the explosion which injured Plaintiff and for a long time prior thereto, Defendant Pioneer Rim & Wheel Company was the authorized truck rim distributor for the Defendant Goodyear within the State of Minnesota and undertook on behalf of Goodyear a rim safety exchange program to eliminate all K-type rims from vehicles owned or operated in the state and undertook to disseminate mounting instructions, safety literature, and warning materials to the users of K-type rims but negligently, willfully and wantonly failed to exer-

cise reasonable care to apprise the public and the users of the availability of the safety exchange for K-type rims or of the instructions, literature and materials and having accepted on behalf of Goodyear the obligation of apprising the user public within the State of Minnesota of the peculiar hazards of K-type rims, the necessity for exchange, discontinuance, recall and avoidance of use, negligently, willfully and wantonly failed to fulfill the obligation to do so as the agents of Goodyear when Defendant Pioneer Rim & Wheel Company, a Minnesota corporation, knew or reasonably should have known that their failures would result in catastrophic injuries to users of the product, including the Plaintiff.

7. As the direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct, and the promulgation of the defective product with actual knowledge of the hazards and the intentional and willful failure to instruct or warn, Plaintiff sustained the actual permanent and progressive injuries and damages as hereinabove alleged, resulting in medical and hospital treatment and custodial care causing him to incur expenses and lost earnings for life, all to his damage in the sum of TEN MILLION AND 00/100 ($10,000,000.00) DOLLARS.

8. That as a further direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct of Defendants, Plaintiffs Terry D. Hodder and Jeanette R. Hodder as parents and natural guardians of their son, Dale L. Hodder, have in the past and will in the future sustain damages and loss of out-of-pocket expenses for the increased costs of the care, custody and maintenance of their severely injured son and have sustained in the past and will sustain in the future derivative

damages in an amount in excess of ONE MILLION AND 00/100 ($1,000,000.00) DOLLARS.

9. Because of the foregoing conduct of Defendants, they should be punished and deterred from such conduct and similar future conduct by an award of punitive damages which Plaintiffs seek in the sum of THIRTY MILLION AND 00/100 ($30,000,000.00) DOLLARS.

WHEREFORE, Plaintiffs pray for judgment against the Defendants in a sum in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for actual, compensatory and derivative damages and a further sum well in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for punitive damages, together with their costs and disbursements herein expended and for such other and further relief as the Court deems just and equitable in the premises.

Niewald, Risjord & Waldeck
A Professional Corporation
2500 Commerce Tower
Kansas City, Missouri 64105-2078
(816) 842-3512

By /s/ John C. Risjord
John C. Risjord

Barna, Guzy, Merrill, Hynes
& Giancola, LTD.
Commerce Park Office Building
7362 University Avenue, N. E.
Fridley, Minnesota 55432
(612) 571-9481

By /s/ Paul E. Godlewski
Paul E. Godlewski
Attorneys for Plaintiffs

STATE OF MINNESOTA)
) ss.
COUNTY OF ANOKA)

Mark Vandelist, being duly sworn, on oath says that on the 7th day of July, 1982, he served the attached Summons and Complaint upon Pioneer Rim & Wheel Company, personally, at 404 Industrial Boulevard, Minneapolis, Minnesota 55413, in the County of Hennepin, State of Minnesota, by handing to and leaving with Steve Fisk for John Cousins a true and correct copy thereof.

/s/ Mark Vandelist
Mark Vandelist

Subscribed and sworn to before me this 7th day of July, 1982.

/s/ Cindy L. Hiller
Notary Public

(Seal)

STATE OF MINNESOTA)
) ss.
COUNTY OF ANOKA)

Mark Vandelist, being duly sworn, on oath says that on the 7th day of July, 1982, he served the attached Summons and Complaint upon Goodyear Tire and Rubber Company, by handing to and leaving with C. T. Corporation Systems, at 1032 Midland Bank Building, Minneapolis, Minnesota 55401, in the County of Hennepin, State of Minnesota, true and correct copies thereof.

/s/ Mark Vandelist
Mark Vandelist

Subscribed and sworn to before me this 7th day of July, 1982.

/s/ Cindy L. Hiller
Notary Public

(Seal)

APPENDIX C

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court File No. 793068

DALE L. HODDER and TERRY D. HODDER and
JEANETTE R. HODDER,
Plaintiffs,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY, an
Ohio corporation and PIONEER RIM & WHEEL
COMPANY, a Minnesota corporation,
Defendants.

SEPARATE ANSWER OF THE GOODYEAR TIRE & RUBBER COMPANY

The Goodyear Tire & Rubber Company (hereinafter "Goodyear") for its Separate Answer to plaintiffs' Complaint states and alleges as follows:

FIRST DEFENSE

I.

Goodyear admits that it is a foreign corporation, that it has district offices located in Minneapolis, Minnesota, and that C T Corporation System is its registered agent for service of process in the State of Minnesota. Goodyear is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1.

II.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2.

III.

Goodyear denies Paragraph 3.

IV.

Goodyear denies Paragraph 4.

V.

Goodyear denies Paragraph 5.

VI.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

VII.

Goodyear denies Paragraph 7.

VIII.

Goodyear denies Paragraph 8.

IX.

Goodyear denies Paragraph 9.

SECOND DEFENSE

X.

Goodyear alleges that plaintiffs' Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Goodyear alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, the Remer Oil Company, or others over whom Goodyear had no control and for whose conduct Goodyear cannot be held liable, said conduct constituting an intervening superseding cause of plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Goodyear alleges that the injuries allegedly sustained by plaintiff Dale Hodder were sustained following the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Goodyear alleges upon information and belief that plaintiffs' claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Goodyear alleges that the "fault" of Goodyear, if any, for which it might be held liable to plaintiffs is less than the "fault," including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Goodyear.

SEVENTH DEFENSE

XV.

Goodyear alleges on information and belief that plaintiffs' claims, or some of them, may be barred by the applicable statutes of limitations.

WHEREFORE, The Goodyear Tire & Rubber Company demands judgment against plaintiffs dismissing the Complaint with prejudice and awarding to The Goodyear Tire & Rubber Company its costs and disbursements herein.

Dated: August 19, 1982.

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey, P.A.
And /s/ Joel A. Flom
Joel A. Flom
2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2795/2717
Attorneys for Defendant The
Goodyear Tire & Rubber Company

APPENDIX D

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court File No. 793068

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.
Third-Party Defendant.

PLAINTIFF'S AMENDED COMPLAINT

Comes now the Plaintiff and for his amended claim against the Defendants, states and alleges as follows:

1. Plaintiff is an individual resident of Remer, Minnesota; Defendants Goodyear Tire & Rubber Company (hereinafter Goodyear) is a foreign corporation authorized to do business in Minnesota pursuant to the records on file with the Secretary of State, State of Minnesota, with dis-

trict offices located in Minneapolis, Hennepin County, Minnesota, and which has appointed the C T Corporation Systems, Minneapolis, Minnesota as its registered agent for service of process, so that Defendant Goodyear resides in Hennepin County, Minnesota; Defendant Motor Wheel Corporation (hereinafter Motor Wheel), a wholly-owned subsidiary of Goodyear, is an Ohio corporation with offices also located in Lansing, Michigan and conducts business in the State of Minnesota through and with Defendant Goodyear and Defendant Pioneer Rim & Wheel Company; Defendant Pioneer Rim & Wheel Company is a Minnesota corporation with its offices and sales outlet located at 401 Industrial Boulevard, Minneapolis, Minnesota so that said Defendant is a resident of Hennepin County, Minnesota.

2. On or about December 19, 1981 Plaintiff Dale L. Hodder was employed at a gas station in Remer, Minnesota and was attempting to mount a Goodyear KWX-KW split rim assembly on the axle of an International Harvester logging truck when it suddenly and unexpectedly exploded in Plaintiff's face causing severe, permanent, painful and progressive injuries to his face, head, brain, eyes, mouth, teeth, soft tissues and other parts of his body.

3. At the time of the design, manufacture, distribution and sale of the K-type split base assembly by Goodyear, the rim was of defective design in that it had a proclivity to blow apart and explode when put to the use intended and anticipated, which proclivity was known to Defendants prior to Plaintiff's injury and the product was defective in that Defendants failed to warn or instruct of the defects, the mounting and handling procedures and the fact that the rim was obsolete and considered dangerous by Goodyear and Motor Wheel so that it should not be used or handled and was further defective in failing to

conform to specifications and contained manufacturing, processing and material defects which caused the parts to fit improperly, mismatch, wear and otherwise become unsafe.

4. At the time of Plaintiff Dale L. Hodder's injury the split K-type rim assembly was in substantially the same condition as when designed, manufactured, sold and distributed by Defendant Goodyear and was used by Plaintiff in the manner in which the product was reasonably intended to be used and as to which Defendants Goodyear and Motor Wheel anticipated its use, i.e., to hold and contain an inflated truck tire, and because of the aforesaid defects in the design, manufacture, material, instruction and warning concerning the K-type split rim assembly it exploded and permanently injured the Plaintiff.

5. At the time of design, development, manufacture, distribution, licensing and sale of the subject K-type rim assembly and prior to Plaintiff's injuries, Defendants knew or reasonably should have known that the design, configuration, materials and construction of the K-type rim components presented an extreme and unusual hazard to the motoring public, to truck owners and users including anyone attempting to mount, inflate, handle, store or transport an inflated K-type rim assembly and with such knowledge Defendants Goodyear and Motor Wheel negligently, willfully, recklessly, fraudulently and intentionally disregarded the safety of the Plaintiff and the public in the following respects:

a. Ignored positive locking devices invented by Goodyear engineers in 1923 and subsequently;

b. Promoted and sold K-type parts as the only domestic manufacturer (Goodyear) and vendor (Motor Wheel) of truck wheels, knowing such assemblies to be extremely hazardous;

c. Failed to recall, retrofit or warn on rim parts following the 1970-73 investigation by the Office of Defects Investigations, National Highway Traffic Safety Administration in which investigation the safety hazard of the rim was reported and documented;

d. Refused in 1971 and previously to drop the K-type rim for safety because it required an extra step to lock, according to Goodyear and Motor Wheel rim engineering;

e. Failed to warn that rims 10 years old and older are extremely hazardous and have caused numerous accidents resulting in persons being killed, blinded and maimed all over the country by the K-type assembly;

f. Attempted to exchange rims at customers' expense in a safety exchange program in which the owner of the rim was required in 1977 and 1978 to pay 90 percent of the retail price of the replacement rim while Goodyear and Motor Wheel continued to profit in the sale of the replacement rim;

g. Failed to warn of the reputation and hazards of the rim in spite of knowledge that the rim was known by experienced tire changers as "the suicide rim" and known by Goodyear and Motor Wheel product liability lawyers and insurers as "treacherous to defend" and having a "shady reputation";

h. Failed to publicize the fact that all K-type rims as of October 6, 1979 are of sufficient age as to present an extreme safety hazard while representing to the motoring public and NHTSA that rims last the life of the vehicle or longer;

i. Misrepresenting in the safety film *You May Not Get A Second Chance* that the K-type rim is an acceptable and available rim component which can be safely assembled, knowing such representations to be false;

j. Represented in Goodyear and Motor Wheel rim catalogs that the K-type rim is or may be available and is a viable and acceptable rim component for current purchase and use, and the same time attempting through an unpublicized safety exchange program to retire K-type rims from service;

k. Suppressed the usage of proposed instruction and warning labels to be affixed to rim parts in order to avoid product liability exposure and embarrassment in the courtroom thereby protecting Goodyear and Motor Wheel corporate interests and profits at the expense of life and limb;

l. Suppressed the single-piece drop center safety rim and failing to develop and promote the sale of it in order to protect Goodyear and Motor Wheel's corporate investment in the tube-type bias truck manufacturing equipment and plants, thereby protecting Goodyear and Motor Wheel corporate interests and profits at the expense of life and limb;

m. Misrepresented facts concerning the K-type rim in the 1970-1973 and 1978-1981 defects investigations of the K-type rim by the Department of Transportation;

n. Failed to undertake a consumer notification campaign at the time the engineering analysis investigation of the K-type rim was opened in October, 1978 and stalling the inevitable recall of the K-type rim to obtain concessions from the Department of Transportation, National Highway Traffic Safety Administration which would:

(1) Require the public to bear more than half the cost of the recall, and

(2) Derive an acknowledgment from the NHTSA that the Goodyear/Motor Wheel L-type split ring was a safe substitution at a time when the L-type rim is also under investigation.

6. At the time of the explosion which injured Plaintiff and for a long time prior thereto, Defendant Pioneer Rim & Wheel Company was the authorized truck rim distributor for the Defendants Goodyear and Motor Wheel within the State of Minnesota and undertook on behalf of Goodyear and Motor Wheel a rim safety exchange program to eliminate all K-type rims from vehicles owned or operated in the state and undertook to disseminate mounting instructions, safety literature, and warning materials to the users of K-type rims but negligently, willfully and wantonly failed to exercise reasonable care to apprise the public and the users of the availability of the safety exchange for K-type rims or of the instructions, literature and materials and having accepted on behalf of Goodyear and Motor Wheel the obligation of apprising the user public within the State of Minnesota of the peculiar hazards of K-type rims, the necessity for exchange, discontinuance, recall and avoidance of use, negligently, willfully and wantonly

failed to fulfill the obligation to do so as the agents of Goodyear and Motor Wheel when Defendant Pioneer Rim & Wheel Company, a Minnesota corporation, knew or reasonably should have known that their failures would result in catastrophic injuries to users of the product, including the Plaintiff.

7. That Defendants, and each of them, breached express and implied warranties of merchantability and fitness for particular purpose to the motoring public, and specifically to foreseeable users of K-type rim assemblies including, Plaintiff Dale Hodder; that Defendants, and each of them, are strictly liable to Plaintiff.

8. As a direct result of the foregoing defects, negligence, willful, wanton, fraudulent and intentional conduct, and the promulgation of the defective product with actual and constructive knowledge of the hazards and the negligent, intentional and willful failure to instruct or warn, Plaintiff sustained severe, permanent, painful and progressive injuries and damages as hereinabove alleged, resulting in past and future medical and hospital treatment and custodial care and have caused him in the past and will cause him in the future to incur expenses and lost earnings for life, all to his damage in the sum of TEN MILLION AND 00/100 ($10,000,000.00) DOLLARS.

9. Because of the foregoing conduct of Defendants, they should be punished and deterred from such conduct and similar future conduct by an award of punitive damages which Plaintiff seeks in the sum of THIRTY MILLION AND 00/100 ($30,000,000.00) DOLLARS.

WHEREFORE, Plaintiff prays for judgment against the Defendants in a sum in excess of FIFTY THOUSAND

AND 00/100 ($50,000.00) DOLLARS for actual, compensatory and derivative damages and a further sum well in excess of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS for punitive damages, together with their costs and disbursements herein expended and for such other and further relief as the Court deems just and equitable in the premises.

Barna, Guzy, Merrill, Hynes
& Giancola, Ltd.
By /s/ Paul E. Godlewski
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3989 Central Avenue, N. E.
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and

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Attorneys for Plaintiff

APPENDIX E

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 793068

Dale L. Hodder and Terry D. Hodder and
Jeanette R. Hodder,
Plaintiffs,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio
corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.,
Third-Party Defendant.

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT

More than two years after filing the Complaint in this action, plaintiff, Dale Hodder (Hodder) now seeks to join a new party defendant, The Motor Wheel Corporation (hereinafter "Motor Wheel"). Goodyear opposes this belated attempt to add an additional party defendant.

Joinder of Motor Wheel at this late date will inject new issues, necessitate discovery, prejudice Goodyear and delay and complicate the trial of this case.[1]

A. *The Legal Standard*

Hodder moves to amend his Complaint pursuant to Rule 15.1, Minnesota Rules of Civil Procedure (MRCP). However, to the extent that Hodder is attempting to join a new party defendant through his amendment, the standards set forth in Rules 19, 20 and 21 governing joinder of parties should be applied. Rule 21 provides in pertinent part, "Parties may be dropped or added by order of the court on motion of any party . . . on such terms as are just." Rule 21 MRCP. A motion to add a party defendant is within the sound discretion of the trial court. Rule 19, 20, 21. 3 A *Moore's Federal Practice* § 21.05.

Each case must be evaluated on its own facts. The benefits to be derived from joinder are weighed by the court against the detrimental effect such joinder will have.

Factors considered by the Courts in denying joinder include:

1. Whether complete relief may be accorded among those already parties.

2. Whether joinder is based on newly discovered facts.

3. Whether new discovery will be necessary.

4. Whether the new party will be bound by prior rulings in the litigation.

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[1] Hodder's amended complaint also deletes Terry and Jeanette Hodder as party plaintiffs and omits allegations contained in paragraph 5 (O) of the original complaint concerning political bribery. Goodyear has no objection to these portions of the proposed amended complaint.

5. Whether the litigation will be unduly complicated.

6. Whether joinder will delay the final resolution of the proceedings.

See generally, *Benger Laboratories Ltd. v. R.R. Laros Co.*, 24 F.R.D. 450 (E.D.Pa. 1959); *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414 (E.D.N.Y. 1972); *Thompson Newspapers Inc. v. Toledo Typographical Union*, 20 F.R.D. 78 (E.D. Mich. 1974), in which the courts denied leave to join based on a combination of the above listed factors.[2]

When the above six factors are applied to the factual circumstances here, leave to join Motor Wheel should be denied.

B. *The Factual Background: Motor Wheel Did Not Design Test, Manufacture, or Distribute The Product Involved in This Case.*

Hodder does not even contend that his motion to join Motor Wheel is justified by newly discovered facts. Instead, Hodder offers the following alleged "facts" to justify joinder. (Brief in support of plaintiffs' Motion For Leave to Amend).

First, Hodder asserts that unspecified individuals who have been employed by Goodyear have also at one time been employed by Motor Wheel. This fact, even if true, is a completely inadequate ground for joinder and does not merit discussion.

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[2] Hodder relies on *LaSalle Cartage v. Johnson Bros. Wholesale*, 225 N.W.2d 233 (Minn. 1975) and other cases arising under Rule 15 which deal with addition of new theories of liability or new claims against one already a defendant, but not with joinder of new parties. The circumstances confronting the court here are completely dissimilar from those in *LaSalle*.

Second, Hodder asserts that Motor Wheel was "involved" with Goodyear in all acts, errors, and omissions alleged in Hodder's case. In support of this statement, Hodder's Minnesota counsel filed an Affidavit in which he asserted that Motor Wheel was the distributor and manufacturer of Goodyear rims and wheels, that no further discovery would be necessitated by joinder of Motor Wheel, and that neither Goodyear nor Motor Wheel would be prejudiced. (Affidavit of Paul Godlewski, dated June 5, 1984). Significantly, however, Hodder does not assert that Motor Wheel was the manufacturer or distributor of the Goodyear rim allegedly involved in this action.

Hodder does contend that the rim involved in this action is a KWX rim manufactured in the 1950's by Goodyear. Hodder's Kansas City counsel is aware that Motor Wheel never manufactured, designed, sold, or distributed the KWX rim.[3] Indeed, Hodder's Kansas City counsel who has litigated multi-piece rim cases for nine years never has attempted to join Motor Wheel as a defendant. Hodder's Kansas City counsel knows that the Metal Products Division of Goodyear was the only manufacturer of the KWX rim. Goodyear ceased all production of the KWX rim in 1962. Motor Wheel, though now a subsidiary of Goodyear, was not acquired by Goodyear until 1964, many years after the date of this rim's manufacture, and two years after Goodyear ceased all production of this rim type. Motor Wheel not only never manufactured the KWX rim nor any other type of K-rim, it was not even a Goodyear subsidiary at the time the KWX rim was manufactured.

---

[3] As the Court is aware, Hodder's Kansas City counsel in this action was both lead and liaison counsel in multi-district litigation proceedings dealing with multi-piece rims. He has had access to evidence garnered in four years of discovery conducted in those proceedings and the past two years of discovery conducted in this action.

Motor Wheel was also not a "vendor" of the KWX rim. Goodyear ceased sales of the KWX in 1964. Motor Wheel never sold the KWX rim. Motor Wheel was not involved in the marketing of any Goodyear multi-piece rim until the late 1960's. Motor Wheel was not and could not have been involved in any way in the design, specification, development, manufacture or sale of the KWX rim.

C. *Complete Relief Can be Accorded Plaintiff Without Joinder of Motor Wheel.*

Denial of leave to amend to join Motor Wheel is particularly appropriate here as no prejudice will result to Hodder. Nowhere in Hodder's pleading does he assert that failure to join Motor Wheel will deprive the present parties of complete relief. Nowhere does he assert that failure to join Motor Wheel will subject those already parties to substantial risk of double or inconsistent liability. Nowhere does he claim that Motor Wheel has any interests relating to this action which it will be unable to protect absent joinder. See Rule 19, MRCP. Joinder is obviously not required pursuant to Rule 19.

D. *Leave to Join Motor Wheel Should Be Denied To Prevent the Complication of Issues, the Necessity of Discovery, And Undue Delay of the Proceedings.*

Because joinder would require discovery, complicate the issues, and delay the trial of this case, joinder is also not proper pursuant to Rule 20 or Rule 21. Despite knowledge of the facts recited in section B above, the proposed amended complaint charges both 1) that at the time of the design, development, manufacture, distribution, licensing and sale of the subject K-type rim assembly "defendants" (Goodyear and Motor Wheel) knew or should have known that the design and construction of this rim were faulty (Second Amended Complaint, paragraph 5.); and 2) that Motor Wheel was the "vendor" of the K-type rim. Further, in paragraphs 3, 5, 6, 7, 8, and 9 of the proposed amended complaint, Hodder refers generally to "defendants" (Goodyear and Motor Wheel) and allege that defendants committed a variety of acts which would involve Motor Wheel as vendor or manufacturer. For example, in paragraph 7, Hodder alleges that "defendants, and each of them, breached express and implied warranties of merchantability and fitness for a particular purpose to the motoring public."

Goodyear knows of no factual basis for these charges. Hodder's Kansas City counsel knows that Motor Wheel Corporation neither manufactured nor sold the KWX rim. As a matter of law, no breach of express or implied warranty of merchantability or fitness for a particular purpose may be imposed against one who is neither a manufacturer or a distributor of a product.[4]

Moreover, Hodder's claims against Motor Wheel are so indefinite and ambiguous that neither Goodyear nor Motor Wheel can determine the factual basis for Motor Wheel's liability without further discovery. Hodder does not specify whether he alleges that Motor Wheel is independently liable for acts for which Goodyear is not liable, whether Goodyear is independently liable for acts committed by Motor Wheel as its agent, whether defendants' liability is concurrent, or whether Goodyear is independently liable for acts not committed by Motor Wheel. Should Hodder's amendment be allowed, his failure to state the basis for the alleged liability of Motor Wheel and his failure to specify a factual basis for liability on the part of Motor Wheel will require discovery both with respect to Hodder's claim and Motor Wheel's defenses.

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[4] No such claims are made in the original Complaint. Such claims are barred as a matter of law by the applicable Statutes of Limitation. See M.S.A. §336.2 - 725.

Finally, it can be assumed that if the injection of Motor Wheel as a party defendant is permitted, it will precipitate a cross claim by the Pioneer Rim and Wheel Co. ("Pioneer"). Pioneer has already cross claimed against Goodyear. Even if Pioneer does not cross claim against Motor Wheel, discovery to establish the basis of Hodder's claim that Pioneer acted as an agent on behalf of Motor Wheel will be necessary.

To allow Hodder to so complicate and delay resolution of the issues here cannot be justified. Hodder's counsel do not even attempt to justify their tardy attempt to join Motor Wheel. Hodder's Kansas City counsel has had hundreds of thousands of documents and thousands of pages of deposition testimony at his disposal for several years.[5] There is no newly discovered evidence, nor any factual basis to justify the belated joinder of Motor Wheel.

Conclusion

For the reasons stated, Motor Wheel is not needed for just adjudication of this litigation. Motor Wheel's joinder is not justified on the basis of facts known to Hodder. Motor Wheel's joinder would prejudice Goodyear, add new issues, require new discovery and unduly delay trial of this case. Goodyear respectfully requests that this court deny Hodder's motion to amend his complaint to join Motor Wheel.

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[5] Hodder's counsel procured the majority of the documents relied on here 10 years ago, in the 1974 case of *Messick v. Goodyear*, No. 74V756-W-2. Additional documents and deposition testimony were obtained by Hodder's Kansas City counsel between 1979 and 1982 through discovery proceedings in the *MDL 362*, the multi-piece rim litigation.

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Attorney I.D. Numbers
112690 – James B. Vessey
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148726 – John W. Curran

Dated: August 16, 1984.

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APPENDIX F

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court File No. 793068

Dale L. Hodder, Terry D. Hodder and
Jeanette R. Hodder,
Plaintiffs,

vs.

The Goodyear Tire & Rubber Company,
an Ohio corporation,

and

Pioneer Rim & Wheel Company, a Minnesota
corporation,

and

The Goodyear Tire & Rubber Company,
an Ohio corporation,
Defendant and Third-Party Plaintiff,

vs.

Remer Oil Company,
Third-Party Defendant.

THE GOODYEAR TIRE & RUBBER COMPANY'S CONSOLIDATED BRIEF CONCERNING DISCOVERY AND OTHER MOTIONS HEARD ON AUGUST 23-24, 1984

* * *

As to the issue of notice, Goodyear has stipulated in other cases and is willing to offer a stipulation in this case which will remove the need for Hodders to prove that Goodyear had notice of a potential danger which created a duty to warn. For the purposes of Hodders' "failure to warn" allegations only, Goodyear offers the following stipulation:

> By at least the mid-1970s, Goodyear had sufficient knowledge of the potential for pressurized separation of multi-piece rim assemblies so as to create a duty on Goodyear's part to make reasonable efforts to warn of that potential danger.

Goodyear is willing to concede that its duty to warn arose prior to the accident involved in this case. * * *

* * *

APPENDIX G

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT

Court File No. 793068

Dale L. Hodder,
Plaintiff,
vs.
The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,
and
The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,
vs.
Remer Oil Company, Inc.,
Third-Party Defendant.

SEPARATE ANSWER OF THE GOODYEAR TIRE & RUBBER COMPANY TO PLAINTIFF'S AMENDED COMPLAINT

The Goodyear Tire & Rubber Company (hereinafter "Goodyear") for its Separate Answer to plaintiff's Amended Complaint states and alleges as follows:

FIRST DEFENSE

I.

Goodyear admits that it is a foreign corporation, that it has district offices located in Minneapolis, Minnesota, and that CT Corporation System is its registered agent for service of process in the State of Minnesota. Goodyear admits that the Motor Wheel Corporation is a wholly owned subsidiary of Goodyear. Goodyear is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 1.

II.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2.

III.

Goodyear denies paragraph 3.

IV.

Goodyear denies paragraph 4.

V.

Goodyear denies paragraph 5.

VI.

Goodyear is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6.

VII.

Goodyear denies paragraph 7.

VIII.

Goodyear denies paragraph 8.

IX.

Goodyear denies paragraph 9.

SECOND DEFENSE

X.

Goodyear alleges that plaintiff's Amended Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Goodyear alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, Remer Oil Company, or others over whom Goodyear had no control and for whose conduct Goodyear cannot be held liable, said conduct constituting an intervening superseding cause of plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Goodyear alleges that the injuries allegedly sustained by plaintiff Dale Hodder were sustained following the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Goodyear alleges upon information and belief that plaintiff's claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Goodyear alleges that the "fault" of Goodyear, if any, for which it might be held liable to plaintiff is less than the "fault", including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Goodyear.

SEVENTH DEFENSE

XV.

Goodyear alleges upon information and belief that plaintiff's claims, or some of them, may be barred by the applicable statutes of limitations.

EIGHTH DEFENSE

XVI.

Goodyear alleges that plaintiff Dale Hodder has failed to mitigate his damages, if any.

NINTH DEFENSE

XVII.

Goodyear alleges that plaintiff Dale Hodder is not the real party in interest with respect to, and lacks standing to assert, claims for damages covered by the

Minnesota Workers' Compensation Statutes, including but not limited to, past and future wage loss, permanent disability, rehabilitation, and medical expenses.

TENTH DEFENSE

XVIII.

Goodyear alleges that plaintiff Dale Hodder was employed in violation of the Minnesota Child Labor Law, and that as a result, his employer, Remer Oil Company, is absolutely and exclusively liable for plaintiff's injuries.

WHEREFORE, The Goodyear Tire & Rubber Company demands judgment against plaintiff dismissing the Amended Complaint with prejudice and awarding to The Goodyear Tire & Rubber Company its costs and disbursements herein.

Dated: April 18, 1985

Dorsey & Whitney
By /s/ James B. Vessey
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Attorneys for Defendant The
Goodyear Tire & Rubber Company

APPENDIX H

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 793068

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Motor Wheel Corporation, an Ohio corporation, and Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation,
Third-Party Plaintiff,

vs.

Remer Oil Company, Inc.,
Third-Party Defendant.

SEPARATE ANSWER OF MOTOR WHEEL CORPORATION TO PLAINTIFF'S AMENDED COMPLAINT

Motor Wheel Corporation (hereinafter "Motor Wheel") for its Separate Answer to Plaintiff's Amended Complaint states and alleges as follows:

FIRST DEFENSE

I.

Motor Wheel admits that it is the wholly owned subsidiary of The Goodyear Tire & Rubber Company, that it is an Ohio corporation, that it has offices located in Lansing, Michigan, and that CT Corporation System is its registered agent for service of process in the State of Minnesota. Motor Wheel denies that it is qualified to do business in the State of Minnesota. Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1.

II.

Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2.

III.

Motor Wheel denies Paragraph 3.

IV.

Motor Wheel denies Paragraph 4.

V.

Motor Wheel denies Paragraph 5.

VI.

Motor Wheel is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

VII.

Motor Wheel denies Paragraph 7.

VIII.

Motor Wheel denies Paragraph 8.

IX.

Motor Wheel denies Paragraph 9.

SECOND DEFENSE

X.

Motor Wheel alleges that Plaintiff's Amended Complaint against it fails to state a claim upon which relief can be granted.

THIRD DEFENSE

XI.

Motor Wheel alleges upon information and belief that plaintiff Dale Hodder's injuries or damages, if any, were caused or contributed to by the conduct, the activities, and the manner or work being done by Dale Hodder's employer, Remer Oil Company, or others over whom Motor Wheel had no control and for whose conduct Motor Wheel cannot be held liable, said conduct constituting an intervening superseding cause of Plaintiff Dale Hodder's alleged injuries or damages.

FOURTH DEFENSE

XII.

Motor Wheel alleges that the injuries allegedly sustained by Plaintiff Dale Hodder were sustained following the expiration of the ordinary useful life of the rim involved.

FIFTH DEFENSE

XIII.

Motor Wheel alleges upon information and belief that plaintiff's claims are barred, since Remer Oil Company was a sophisticated user of wheel, rim, and tire products.

SIXTH DEFENSE

XIV.

Motor Wheel alleges that the "fault" of Motor Wheel, if any, for which it might be held liable to plaintiff is less than the "fault," including contributory negligence, misuse, and assumption of the risk, of Dale Hodder; therefore, plaintiff may not recover against Motor Wheel.

SEVENTH DEFENSE

XV.

Motor Wheel alleges upon information and belief that plaintiff's claims, or some of them, may be barred by the applicable statutes of limitations.

EIGHTH DEFENSE

XVI.

Motor Wheel alleges that Plaintiff Dale Hodder has failed to mitigate his damages, if any.

NINTH DEFENSE

XVII.

Motor Wheel alleges that Plaintiff Dale Hodder is not the real party in interest with respect to, and lacks standing to assert, claims for damages covered by the Minnesota Workers' Compensation Statutes, including but not limited to past and future wage loss, permanent disability, rehabilitation, and medical expenses.

TENTH DEFENSE

XVIII.

Motor Wheel alleges that Plaintiff Dale Hodder was employed in violation of the Minnesota Child Labor Law, and that as a result his employer, Remer Oil Company, is absolutely and exclusively liable for plaintiff's injuries.

WHEREFORE, Motor Wheel Corporation demands judgment against plaintiff dismissing the Amended Complaint with prejudice and awarding to Motor Wheel Corporation its costs and disbursements herein.

Dated: February 12, 1985.

Dorsey & Whitney
By ....
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APPENDIX I

(Filed April 11, 1986)

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT

File No. 793068 N

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, Pioneer Rim & Wheel Company, a Minnesota corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,
Third-Party Defendant,

and

Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendant and Third-Party Plaintiff,

vs.

Acheson Tire Company, a Minnesota corporation, Arrowhead Equipment Company, a Minnesota corporation, and Itasca Tire Company, a Minnesota corporation,
Third-Party Defendants.

ORDER RE: MOTIONS IN LIMINE AND OTHER PRETRIAL MOTIONS

* * *

4. Goodyear and Motor Wheel's motion to strike from the plaintiff's Amended Complaint all allegations of a duty to recall or retrofit, and Goodyear and Motor Wheel's motion *in limine* to preclude plaintiff's counsel from introducing evidence or making reference during argument to any alleged duty to recall or retrofit is denied. Such evidence is probative of the reasonableness of Goodyear and Motor Wheel's actions with respect to their duty to warn and their possible assumption of a duty to recall.

5. Goodyear and Motor Wheel's motion *in limine* to exclude evidence of the consideration given by Goodyear or Motor Wheel to the use of warning labels in 1975 and 1976 is denied. Evidence of Goodyear or Motor Wheel's activities with respect to warning labels is probative of the overall duty to warn, and the probative value of such evidence outweighs any potential prejudicial impact upon the defendants.

* * *

APPENDIX J

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

Court File No. 793068

Dale L. Hodder,
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Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation and Motor Wheel Corporation,
Defendants and Third Party Plaintiffs,

v.

Remer Oil Company, Inc., a Minnesota corporation,
Third Party Defendant,

and

Pioneer Rim & Wheel Company, a Minnesota corporation,
Defendant and Third Party Plaintiff,

v.

Acheson Tire Company, a Minnesota corporation; Arrowhead Equipment Company, a Minnesota corporation; and Itasca Tire Company, a Minnesota corporation,
Third Party Defendants.

PLAINTIFF'S TRIAL BRIEF

* * *

B. Liability For Failure To Warn And Instruct.

The Minnesota Courts have also recognized the merger of strict liability and negligence concepts in failure to warn cases. *Bilotta, supra,* at 622; *Germann v. F. L. Smithe Machine Co.,* No. C9-85-1442 (Minn.App., Feb. 18, 1986, p. 12); *Peterson v. Little-Giant Glencoe Portable Elevator Division of Dynamics Corporation of America,* 349 N.W.2d 280, 284 (Minn.App. 1984); reversed on other grounds 366 N.W.2d 111 (Minn. 1985); *Hauenstein v. Loctite Corp.,* 347 N.W.2d 272, 275 (Minn. 1984). This recognition is embodied in J.I.G. III-118 wherein the differentiation between strict liability and negligent failure to warn consists merely of the "label" given to the instructions.

1. Defendants had a duty to give warning and instruction adequate both in content and method of communication to all foreseeable users, including Hodder.

Under Minnesota law, a manufacturer has a duty to adequately warn and instruct foreseeable users of dangers involved in the use of its product. *Germann, supra* at 12; J.I.G. III-118. This duty is enhanced by the fact that product manufacturers are "held to possess the skill of an expert in the field and are obliged to keep informed of scientific discoveries in the field." *Bertrand v. Johns-Manville Sales Corp.,* 529 F.Supp. 539, 542 (D. Minn. 1982); *Willmar Poultry Co., supra; O'Hare v. Merck & Company. Inc.,* 381 F.2d 286, 291 (8th Cir. 1967).

The scope of the manufacturer's duty to adequately warn and instruct is measured in both quantitative and qualitative terms. From a quantitative standpoint, the Minnesota Courts have held that the duty to warn "extends to all reasonably foreseeable users." *Hauenstein, supra,* at 275; *Germann, supra; Smits v. E-Z Por Corporation,* 365 N.W.2d 352, 355 (Minn.App. 1985). Foreseeability must take into account the manufacturer's status as an expert in the field - in this case multi-piece truck rims. Despite this requirement, neither Goodyear/Motor Wheel nor Pioneer bothered to provide any warning or instructional information to Hodder or the Remer Oil Company. None of the defendants can seriously contend that Hodder and Remer Oil were not foreseeable "users" of the K-Rim.

Additionally, where the use of a product poses great danger the courts have held that the manufacturer must take greater steps to insure the communication of an adequate warning to the ultimate user. The United States Court of Appeals for the Eighth Circuit in *Hopkins v. Chip-in-Saw, Inc.,* 630 F.2d 616 (8th Cir. 1980); held,

> When a manufacturer can reasonably foresee that the warnings it gives to a purchaser of its product will not be adequately conveyed to probable users of the product, then its duty to warn may extend beyond the purchaser to those persons foreseeably endangered by the product's use. Warnings given to the purchaser do not necessarily insulate the manufacturer from liability to injured users of the product.

Id. at 619. Specifically in the multi-piece rim explosion context, the Eighth Circuit held in *Griggs v. The Firestone Tire & Rubber Company,* 513 F.2d 851 (8th Cir. 1975); that,

> If the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful.

Id. at 858. Goodyear/Motor Wheel failed to adhere to this duty. Importantly, Pioneer even had an opportunity to physically deliver such information to Dale Zorman, owner of Remer Oil Company, once when Mr. Zorman purchased wheels at Pioneer and on several occasions when Pioneer's representative Don White drove through Remer, Minnesota. Defendants have miserably failed to satisfy the quantitative aspects of their duty to warn.

Warning and instructional adequacy is also evaluated in qualitative terms. J.I.G. III-118 provides,

> For a warning to be adequate it must be set out in such a way that heeding the warning will make the product reasonably safe for use. The warning must be in a form which could reasonably be expected to catch the attention of, and be understood by, the ordinary user.

Thus, qualitative adequacy is judged both in the form and method of communication the warning and instruction takes as well as its content. In *Griggs*, plaintiff was severely injured by the explosive disassembly of a multi-piece truck rim manufactured by Firestone. Upholding the jury's finding that Firestone breached its duty to warn plaintiff, the Court concluded,

> Many such articles can be made to carry their own message . . . indicating with a substantial sufficiency

> their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may be well that the supplier should be required to adopt them.
>
> By any standard, the danger inhering in defendant's products must be deemed great: there is an obvious potential for severe injury from wholly unanticipated explosion of wheel assembly under great pressure in close proximity to the repairman. As Firestone acknowledges in its warning literature, the resulting harm may easily be grievous body injury or even death. . . . [A]s noted in the Restatement, reasonable care may dictate that a warning be impressed directly on the article when (as here) the danger is great and such a warning would not be impracticable or unduly burdensome. Plaintiff presented testimony from which the jury could find that such a warning was practicable and, since Firestone already impresses identification information on its rim parts, the jury could obviously find that the impressing of additional warning information was not unduly burdensome.

Id. at 858, 859. Additionally, it is well settled in Minnesota that an adequate warning must warn of *all* dangers associated with the use of the product. *Blasing v. P.R.L. Hardenbergh Co.*, 226 N.W.2d 110, 115 (Minn. 1975); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 158 (8th Cir. 1975).

Hodder's evidence will be that defendants' efforts to warn and instruct him were inadequate both in content and method of communication. Hodder anticipates that defendants will extol the virtues of their warning and instructional information and their efforts to disseminate that information. However, such information, even if it had been provided to Hodder, fails to satisfy defendants' duty to warn and instruct because it does not warn the ultimate user or consumer of the defects present in the K-rim design, nor does it instruct in the procedure necessary to avoid the danger posed by the defects. Further, despite the admonition of the Eighth Circuit in *Griggs*, which Hodder's evidence shows was communicated directly to Goodyear/Motor Wheel, it never placed any on-product warnings on multi-piece rims, including the K-rim. Considering the serious danger posed by the K-type assembly under inflation pressure, on-product warnings and instructions containing the detailed information set forth above were required by Minnesota law.

2. Defendants have a continuing duty to warn and instruct.

The duty of Goodyear/Motor Wheel and Pioneer to warn and instruct continues well past the date of manufacture or sale of the subject K-type rim. In *Leskey v. Heath Engineering Co.*, 293 N.W.2d 39, 41 (Minn. 1980), the Supreme Court found the defendant manufacturer of a cutting machine liable for failure to warn of dangers arising from foreseeable changes in the product occurring after the product left defendant's control. The Court in *Germann, supra*, reached a similar conclusion. No. C9-85-1442 (Minn. App., Feb. 18, 1986, pg. 13) This continuing duty to warn is consistent with the Minnesota requirements that the manufacturer keep apprised of all scientific developments in its field of expertise. *Willmar Poultry Co., supra*. Even though Hodder will prove that

Goodyear/Motor Wheel knew prior to the manufacture of the subject K-rim that it was defective and unreasonably dangerous, that knowledge continued to accumulate in the years prior to 1981 when Hodder was injured. Such a continuing duty is especially important where the product involved is one that has an undefined useful life and is likely to exist in the marketplace for many years. Knowing this to be the case, Goodyear/Motor Wheel and Pioneer have a duty, especially toward younger and more inexperienced users such as Dale Hodder, to disseminate warning and instructional information on a continuing basis. *See, Frey v. Montgomery Ward & Co., Inc.*, 258 N.W.2d 782, 786 (Minn. 1977).

This continuing duty to warn, or obligation to impart information regarding a product when it is, or should be, obtained, is well recognized in other jurisdictions as well. In the leading case, *Comstock v. General Motors Corp.*, 99 N.W.2d 627 (Mich. 1959), defendant discovered a defect in the brakes of its 1953 model Buicks after many had been manufactured and sold. However, it did not warn the purchasers of the automobiles of the defect. Addressing defendant's continuing duty to warn of defects discovered after the product is placed in the hands of the consumer, the Court held,

> If such a duty to warn of a known danger exists at the point of sale, we believe a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.

Id. at 634. Other cases in which a manufacturer or seller was found liable for failing to warn of defects and dangers discovered after the sale or delivery of the product are *Jet America, Inc. v. Gates Learjet Corp.*, 243 S.E.2d 584 (Ga.App. 1978); *Braniff Airways, Inc. v. Curtis Wright Corp.*, 411 F.2d 451 (2d Cir. 1969); *Sterling Drug, Inc. v. Cornish,* 370 F.2d 82 (8th Cir. 1967); and *American Oil Co. v. Nicholas,* 157 S.E. 754 (Va. 1931).

3. Defendants have a duty to conduct consumer notification or product withdrawal when other warning efforts fail.

The duty to conduct a consumer notification, withdraw the offensive product from production or conduct a recall campaign, is nothing more than the outgrowth of a manufacturer's continuing duty to warn and instruct. If the manufacturer has knowledge that its product is defective or dangerous and its warnings and instructions do not protect the consuming public from harm, then it must take remedial action in one of the forms suggested above. This duty was recognized by the United States Court of Appeals for the Eighth Circuit in *Kehm v. Proctor & Gamble Manufacturing Co.*, 724 F.2d 613 (8th Cir. 1983); wherein the Court upheld the trial Court's admission of plaintiff's evidence that defendant withdrew its Rely tampons after receiving pressure from the Food & Drug Administration. The Court held that the evidence was not only admissible to rebut defendant's claims that the withdrawal of the product was voluntary but,

> . . . also to show the existence or nonexistence of a *duty* to withdraw the product.

Id. at 622. [Emphasis supplied] It is important to note that the "withdrawal" discussed in *Kehm* involved not only ceasing production of Rely tampons, but their removal from the marketplace.

Further, in the case of motor vehicle manufacturers such as Goodyear/Motor Wheel, such a duty is directly imposed by federal law. The National Traffic Motor Vehicle Safety Act (NTMVSA), 15 U.S.C. § 1411 requires the motor vehicle manufacturer who discovers a defect relating to motor vehicle safety in one of its products to remedy the defect by recall if necessary. NTMVSA, 15 U.S.C. § 1411, provides:

> If a manufacturer—
>
> (1) obtains knowledge that any other motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety; or
>
> (2) determines in good faith that such vehicle or item of replacement equipment does not comply with an applicable Federal Motor Vehicle Safety Standard prescribed pursuant to §1392 of this Title;
>
> he shall furnish notification to the secretary and to owners, purchasers, and dealers, in accordance with §1413 of this Title, and he shall remedy the defect or failure to comply in accordance with §1414 of this Title.

15 U.S.C. § 1414 provides in relevant part:

> (a) . . .
>
> (2)(A) in the case of a motor vehicle presented for remedy pursuant to such a notification, the manufacturer . . . shall cause the vehicle to be remedied by whichever of the following means he elects:
>
> (i) by repairing such vehicle.

> (ii) by replacing such motor vehicle without charge, with an identical or reasonably equivalent vehicle.
>
> (iii) by refunding the purchase price of such motor vehicle, in full, less a reasonable allowance for depreciation . . .
>
> (a) . . .
>
> (2) (B) . . .
>
> (4) The requirement of this section that remedy be provided without charge shall not apply if the motor vehicle or item of replacement equipment was purchased by the first purchaser more than eight (8) calendar years . . . before (A) notification respecting the defect or failure to comply is furnished pursuant to §1411 of this Title . . .

Clearly, the provisions of NTMVSA require a manufacturer who discovers a defect in a product to notify the Department of Transportation and members of the consuming public of the defect. Further, the Act requires that once notification is made, the manufacturer take action to remedy the defect. Hodder will prove unequivocally that Goodyear/Motor Wheel had the requisite prior knowledge of the defect and dangers in the use of K-type multi-piece rims and that those defects and dangers were substantial. The existence of a demand by the National Highway Traffic Safety Administration (NHTSA) to recall the K-type rim in 1979 and the existence of approximately 170 other occurrences of explosive separation of K-type multi-piece rims alone are sufficient to impose a duty to recall upon Goodyear. It is important to note that even though 15 U.S.C. § 1414 does not require manufacturers to undertake a remedy entirely free of charge for products over eight years of age, their duty to nevertheless undertake such a remedy is not affected.

In addition to the duty imposed by NTMVSA, Goodyear's Chairman of the Board, Charles J. Pilliod, Jr., on August 21, 1974, wrote to all officers and employees of Goodyear and its subsidiary companies that they were directed to give "complete dedication" to the "better safe than sorry" policy of product safety (Plaintiff's Exhibit 83). Pilliod wrote that "a product defect which creates a risk of injury to the person using the product is considered a safety-related defect." *Id.* Echoing Pilliod's charge, Goodyear's Vice President of Product Quality & Safety, Robert Milk, in 1983, testifying by deposition in *Alban v. The Goodyear Tire & Rubber Company*, No. 82-13706-CA-18, Circuit Court in and for Dade County, Florida, confirmed that Goodyear had a duty in the interest of public safety to recall a product if it was discovered to be defective (Plaintiff's Exhibit 189). Such testimony constitutes an admission against interest of Goodyear/Motor Wheel. Based on this knowledge Goodyear/Motor Wheel conducted a "Safety Exchange Program" in 1977 aimed at getting multi-piece rims twelve years old or older off the road. Pioneer "participated" in the program. However, Goodyear/Motor Wheel offered such an economically unattractive exchange that the program was a complete failure. In 1982, Goodyear/Motor Wheel wrote to Pioneer and requested a special program to remove K-rims from service in Minnesota. The program never came to fruition because Pioneer refused to voluntarily assume any responsibility for the program. Thus, even if no duty pre-existed these programs, defendants assumed the duty to remove older rims from service (which would have included the subject K rim) and were legally bound to exercise due care in the completion of that duty. *See,* Section I.D., *infra.* Yet, despite their recognition of a serious problem, defendants never developed a product exchange program reasonably calculated to remove multi-piece rims from service.

Hodder does not seek an order of this Court compelling Goodyear/Motor Wheel to recall the K-type rim and does not suggest that the Court has the authority to order such a recall. Rather, defendants' knowledge of the inherent defect and danger of the K-type rim combined with their inadequate efforts and results in warning and instruction, left them only one choice in the interest of public safety—remedial action in the form of product withdrawal, consumer notification or recall.

* * *

APPENDIX K

OPENING STATEMENT OF GOODYEAR COUNSEL

* * *

[2633] Every time Goodyear and every year Goodyear has looked at why accidents are happening, every expert, like whether it be Bob Harold or Gerhart Gerbeth or Bob Smith, who I'm going to start talking about now, they have found that the solution to solving accidents with truck rims is proper training. So that defines the problem.

You have many, many experts, many, many experts at Goodyear and outside of Goodyear, leading experts in this country and the government, all looking at safety with truck rims, and the solution is proper training, follow industry safety practices.

Now, let me start a story on the third section of what I wanted to talk to you about, and that deals with warnings. The plaintiff has claimed that we failed to warn about the dangers, potential dangers in working on truck rims if you don't do it right, don't follow standard safety practices. He claims we failed to warn.

The fact is that Goodyear has conducted a massive and systematic warning campaign designed to reach the 330,000 tire servicemen in this [2634] country about the safe way to use multi-piece rims and single-piece rims, rims of any design. This program has been studied, outside experts have been consulted, it's been improved, it's been intensified, and we have done everything that can be reasonably required of a manufacturer to warn about the potential danger with truck rims and how to avoid it.

There's one important thing to keep in mind in this case, and it's one of common sense. Goodyear is a manufacturer. Goodyear makes the rims, but it doesn't sell the rims to Mr. Zorman who runs Remer Oil, it doesn't sell the rims to other tire shops in Minnesota. It sells rims to distributors, and the distributor for Firestone rims and Goodyear rims in the State of Minnesota is Pioneer Rim and Wheel.

Some of the witnesses in this case will be two people from Pioneer Rim and Wheel, a Don White and a John Cousins. And so you see that we have no control over what happens in the work place. We don't employ Dale Hodder, we can't hire and fire Dale Hodder. We have no business relationship even with Remer Oil.

Training, training has to be done by the [2635] employer. The manufacturer cannot train. GM doesn't train everybody to drive a car.

At various points and many points, at all points Goodyear studied in the field how the product was being used. Let me start a story with Bob Smith. He will be one of our witnesses in this case. Bob Smith is what Motor Wheel calls a field engineer. He is employed by the Motor Wheel Corporation. Gerhart Gerbeth you will learn when he takes the stand is a rim design engineer, and he goes out in the field and investigates accidents, but Bob Smith is a field engineer and he works out in the field all the time.

In the early 1970s, because of Goodyear's concern about accidents with truck rims, all truck rims, and what they could do to help warn and educate people to follow safety practices, they asked Bob Smith to do a study, a study in the field. And he went out into the field, and this is in 1972, November of 1972.

Now, who was concerned enough to ask Bob Smith to do a study? It was the top management in Goodyear. They are concerned because any time there's an accident with a Goodyear product, they are extremely concerned. And they asked Bob, [2636] the top people at Goodyear were concerned enough to ask Bob Smith and others like him, I'm using Bob Smith as my example now, in November of '72 to study accidents. He did three things. He looked and went out to the field and examined how tire servicemen were working on the product.

[2637] He traveled to the tire shop and looked to see what safety practices were being followed. Bear in mind for years Goodyear had mailed safety literature and distributed safety literature to tire shops and tire people that work on these rims, and so the safety literature was being mailed out. So Goodyear wanted to know whether people were paying attention to this safety literature.

Bob Smith was out in the field examining this and making a formal report in November of 1972 through April 1973. He also looked at accident files, the same files that the government has looked at and found that the accidents were caused by improper assembly, the same files that you will see in this case. He studied accident files and investigations by people like Gerhart Gerbeth and other experts who have investigated accidents and by people who collected information on how an accident happened. That's the second thing he did.

Then he visited the government and got the government's attitude and what they had done and what they had found. He went to the DOT, and the DOT informed him that Goodyear was one of the most safety-minded companies—

MR. FLASKAMP: (Interposing) Your Honor, [2638] that's improper argument.

MR. HENDRICKS: That was part of his—

THE COURT: Excuse me, the objection is sustained.

MR. HENDRICKS: That was part of the study, those three things. And in April of 1973, April 5th, 1973, he issued a multi-page study, a twelve page study about accidents. And what did he find? He found that accidents were being caused by people using, number one, damaged and bent parts, number two, misassembly, and three, improper servicing techniques like using a hammer, the same things that Goodyear has always made with respect to its investigation of accidents.

Bob Smith was also asked to make any recommendation he could to help improve safety in the workplace and what could Goodyear do about it.

After making these findings—in addition, I should say another one of his findings would be that safety practices were not always followed in the workplace. People weren't always following Goodyear's instructions on how to use the product.

So with those things, Bob Smith went to the vice president of safety at Goodyear. He presented these findings to Goodyear people, he presented his findings to [2639] his superiors at Motor Wheel, so they would know his study and his concerns and what his recommendations were. This was part of Goodyear's overall effort. He wasn't the only person working on rim safety in the early 70's, but he is just one person.

So he went to the vice-president of safety because they were concerned, and they then talked about his recommendations and what could be done.

Then he went to a third group. He went to Lansing and talked to the rim design engineering team headed by Gerhart Gerbeth, and he talked to him about his findings so that people would know how rims were being used in the field, and he made several recommendations and several ideas. One of his ideas was that the warning literature should be improved with pictures in the warning literature so that people would know what a damaged rim looks like. So the warning literature was re-designed so it could be more communicative. That was done as a result of Bob Smith's study.

He also recommended that Goodyear produce a safety film, and Goodyear produced a safety film which is called "You may not get a second chance". Now, why do you call it "You may not get a second chance"? Well, it's because there are two goals that Goodyear tries to accomplish in all its warning literature. It [2640] tries to impress upon the tire serviceman that there can be a danger in working on this product if you don't work on it correctly, if you don't follow safety practices. So they titled it "You may not get a second chance."

And in all of the warning literature that Goodyear puts out, they try to emphasize the fact that serious injury or death can result from the misuse of the product. So education, that's what they are after. And then once you do that, once you educate a person about the potential danger, then you tell them how to do it correctly, how to work on it correctly.

Now, in addition to the film, there were about six other ways in which Goodyear's warning effort went forward. Goodyear designed safety charts and wall posters, and now it's an accepted safety rule and accepted safety practice in the industry to have posted safety charts. We will show you in our presentation the kind of safety charts that Goodyear developed and designed. These charts tell you how to assemble a rim, they show you through pictures the proper assembly techniques for all of major rim designs, and they are to be posted in the workplace. This is an accepted industry safety rule to post these kind of charts.

[2641] That safety chart tells the workmen, don't use bent, distorted, broken parts. It tells the workmen to correctly assemble it. It tells the workmen about the potential dangers if you don't do it correctly. It tells the workmen to not hammer on an inflated assembly, particularly to try and correct a problem of a bend in a product. Those are safety rules.

Another form of literature developed by Goodyear are the safety manuals. Goodyear has found that the best way to communicate all of the proper ways of working on each of the rim types that all of the manufacturers have is to put them in a manual in the workplace. So now it's an accepted safety rule that you have safety manuals in the workplace, and Goodyear distributes them.

Another way that Goodyear tries to warn workmen is through catalogs. All of Goodyear's catalogs have safety instructions, safety material in the catalog itself.

Again, just like in the safety manuals, there are basic safety rules in the catalogs, and one of them is that you throw away a bent or distorted, heavily corroded part, that you don't use it because it can be dangerous. You must assemble it properly and use proper assembly procedures, a proper safety cage, and you must not hammer on an inflated [2642] assembly.

I have mentioned the film. Let me now mention another way to reach the three hundred and thirty thousand tire servicemen in the country, and that is articles. Goodyear has people that work on the safety program, and one of them we are going to have testify in this case is Phil Rosenberger, and he has spend decades in designing and working and himself going out in the field and going to tire conventions and studying the best way of communicating with tire servicemen.

[2643] What Goodyear has done is actually written articles and have them published in trade journals, trade journals that are sent to tire service shops. These articles discuss the way to work on a rim safely.

By the way, ads. I'll put ads up for advertisements. In all trade journals, Goodyear published advertisements about the safety literature and the need for safety, sometimes developing its communication message in forms of cartoons, various means of studied ways of communicating how to work on a tire, truck rim assembly safely. So those last two deal with the trade publications that are sent out to people at tire service shops.

Then the last way is something that Goodyear has done. It's worked extensively with the Federal Government.

How are these materials distributed? Through its research, Goodyear obtains names of all the tire service shops it can find and it mails this literature. So it conducts what we call notification campaigns, or mailing campaigns, with safety manuals, safety charts and what we call safety kits—are mailed across the country to tire service shops.

[2644] Then Goodyear-Motor Wheel salesmen actually travel the country to deliver the safety message that Goodyear wants to present.

You will see in this case that people from Goodyear and Motor Wheel actually came up to the State of Minnesota to show the film, where they could find tire servicemen to show the film to.

Now, people distributed warning literature. Goodyear speaks at the conventions and trade shows about the need for safety and promoting safety.

Now, besides its own salesmen and besides the mailing and notification campaign that Goodyear has been doing with great intensity over the years, there's another way in which Goodyear gets out the safety message it has. That is through its distributors.

I'm back again to my point that Goodyear makes the product but it neither distributes it in Minnesota nor does it sell it to people in Minnesota or any other state. But distributors like the one in Minnesota, which is located in Minneapolis, has salesmen, salesmen that go around to tire service shops. Goodyear has instructed its distributors at any time that they call on a tire service shop to leave its safety brochures, [2645] charts, manuals. This way is another means of getting out the safety message.

Now, these things have been done and analyzed. As I said, there has been improvements and studies by people as the best way to get the message across on safety. They've been done for years. The message is reaching tire servicemen.

Now, it will be our point in the case that people should either know or should have known about the potential dangers in working on multi-piece rims or single piece rims if you don't do it correctly.

Now, besides the safety programs that were improved and intensified after Bob Smith's study in the 1970s—I mentioned another thing, that Goodyear worked with the Government. In 1974 the government went to Goodyear, Mr. Gerhart Gerbeth, to head the ad hoc committee to design the first warning posters for the government. You see, the DOT was interested in safety also. They have designed warning posters, warning charts of their own, the Department of Transportation, NHTSA.

And who do they go to to head the committee? They go to Goodyear. Mr. Gerbeth was appointed chairman of that committee. He [2646] designed the first warning literature for the Federal Government.

Now, that's not the only way that Goodyear has gone to the Federal Government. It's actually petitioned the Federal Government. It's petitioned the Federal Government to look at hazards with multi-piece rims and study it, and asked the government to do all it could. So it's been a joint effort.

Goodyear also has investigated other ideas. That takes me to another subject. One of the ideas that Bob Smith proposed and recommended, and which Goodyear did and which other engineers proposed—is there a foolproof device that Goodyear engineers could come up with that would prevent a misassembly? In other words, prevent any human error. Engineering programs were pursued with Goodyear to see if there were any foolproof devices. Can engineers working on the problem of people misusing the product develop a device which is prohibitive? Various things were studied. You can continue studying these things, but none were practical. For instance, remember this rim was last made in 1968, but they were working on latching devices for the L rim, [2647] things that would latch the rim and see if that wouldn't improve safety and on test after test after test and material after material after material was tested. Latching devices just don't work. They don't work on the K rim, they don't work on that rim (indicating) and they don't improve the performance of the rim.

Now, every time there is a circle of the wheel there is additional load placed on the rim. It actually flexes. We'll talk about some of the engineering requirements of any latching device and some of the tests and all the things they developed, but the conclusion is, universally, whether it be Firestone or anybody in the industry, latching devices don't work and would not be effective. There is no latching device by any manufacturer in this country for that very reason. Firestone has tried it, Goodyear has tried to develop it. They just don't work. Tests show they don't work.

Now, Goodyear has studied whether warning labels would be an effective way of communicating the danger, potential danger, of working on rims if you misused the product. It's had experts advise us on warning labels. It's designed [2648] warning labels. It's the conclusion of all experts, number one, it's impractical.

It's impractical because rims are subjected to the corrosive elements of weather and road salts from the very beginning and they won't last. There's nothing that you can do to place a label on there that is going to last 26 years.

Of course when this rim was made in 1955, labels were not used on any products and we think the plaintiff's counsel here is giving you a little bit of a red herring. But let me explain it this way. He is saying that the warning labels should have gone on this rim or the single-piece rim, should have gone on the L rim in 1976 (indicating).

A lot of experts have studied this, including Dr. Roger McCarthy, who has studied this more than probably any other person in the country, including the government, including other manufacturers. Warning labels don't work.

Communication experts, communication experts have found this fault with warning labels on truck rims. You can't put all the assembly techniques, you can't train a tire serviceman with [2649] a warning label, you can only put on a very limited amount of information, and you may be emphasizing one piece of information over the other. So there are technical problems in terms of communication in what experts in the communications say with warning labels.

It all comes back, every expert that has looked at the safety and the way to get out the safety message, it all comes back to training, that's the solution.

So where are we now? We're at a point in our study of rim accidents, truck rim accidents where the solution is what Bob Smith said it was in 1973 and what the government says now: Training. And that's the first word in one of Goodyear's safety manuals, do not work on these rims unless you are trained. Use rim manuals and all charts, safety rules, use a safety cage. Don't hammer on inflated truck rim assemblies.

* * *

APPENDIX L

ARGUMENTS OF GOODYEAR COUNSEL

* * *

[942] Then he goes out into the field and he's telling people at Goodyear some of the things he found, and he says, "In general, field practices are poor," and that's why Goodyear put out all the warning literature that you [943] will hear about after 1973, that is why Goodyear sent around its own salesmen after 1973 to show films, and you will hear a lot of that come in through what Pioneer did. Pioneer put on warning literature to get—to tell people that they need to maintain the product.

Now, one of the things Goodyear did, and we'll offer that in the trial, Your Honor, is it produced a film following Bob Smith's memo. As part of its education and safety efforts it produced a film in 1977 which was called "You May Not Get a Second Chance." And that film starts out demonstrating the explosive force of a multi-piece rim, something which is not in issue, but it does that for purposes of warning.

And so Goodyear produced an instructional film which showed how to maintain, and it did this after the Bob Smith memo, and it did this because it was a concerned enough company to go out in the field and investigate the poor practices that some people were following.

So before Mr. Hodder's accident, and this will be in evidence, Your Honor, Goodyear employees themselves traveled the country and you will see where they traveled into Minnesota and Northern Minnesota, distributing the Goodyear film, distributing Goodyear warning literature of the type you've seen. * * *

* * *

[964] One of the aspects of this trial, is it becomes relevant, and any of these documents become relevant depending on the Court's rulings, will be to show the really massive efforts that Goodyear and the industry made throughout the 70's in the distribution of warning literature, in contacting trade publications to have them print safety information, and going to conferences and actually speaking and contacting the tire rim servicemen, and actually sending people out to the country to tire rim servicemen at the place of their employment. These were on-going safety campaigns that were increased and conducted on a year-by-year basis by Goodyear throughout the 70's and 80's up to today. The reason why they approached this safety campaign and not removing a rim from the field is that the accident again doesn't relate to the rim; it relates to training the tire rim serviceman.

* * *

[967] He talks about education and sales campaign. Those were done. It talks about DOT. What can DOT do? That's in the middle of the page. I've already told you within months after this memo was written the chief design engineer, Gerhart Gerbeth, was elected by DOT and by his peers to design safety literature that the government would distribute and which Goodyear would help distribute. That was done in 1974 and it was done in 1975, and it's done today. It's done every year. It's done continuously. It's done in a fashion which would reach every place that can reasonably be reached by mailing cam-

paigns and finding addresses where people can receive this literature.

* * *

[1587] * * * Anybody in this world that has anything at all to do with rims knows that if you do something that causes an accident with a rim that it can result in a very serious injury or death, because there is a tremendous amount of explosive energy in the tire. It's nothing that Goodyear denies. In fact, in 1976, they asked the government to find that it was hazardous. There were warning posters. I showed you. They're graphic. Goodyear warns about it. It's nothing that's been hidden. In fact, it's just the opposite. The industry has publicized.

* * *

[8847] MR. HENDRICKS: And we think that the law is that we can meet our duty to warn by showing reasonable efforts. That's the test. Therefore, that applies both to plaintiff and the employer, absolutely and without any question. That seems to me is clear law.

* * *

[12,873] The plaintiff has been arguing throughout this case that there is a continuing duty to warn, * * *

* * *

[14,043] Clear and convincing evidence means that the evidence must lead you to conclude that it is highly probable that Goodyear acted with willful indifference to the rights or safety of others. Put another way, the evidence must produce in your minds a firm belief or conviction that Goodyear acted in willful indifference to the rights or safety of others.

* * *

APPENDIX M

EVIDENCE OF WORTH

* * *

[6264] THE COURT: * * * The record has been made and the document will be received. You may read what portions you want to read, Mr. Risjord.

MR. RISJORD: From page 26, Your Honor.

THE COURT: What's the exhibit number there that we are dealing with?

MR. RISJORD: This is 172.

THE COURT: Thank you.

* * *

[6265] MR. RISJORD: The net sales of Goodyear Tire & Rubber Company for the year ending December 31, 1985, nine billion, five hundred eighty-five point one million dollars.

Total income, nine billion, seven hundred thirty point three million dollars.

Net income, four hundred twelve million four hundred thousand dollars.

The assets as of December 31, 1985, six billion, nine hundred fifty-three point 5 million dollars.

* * *

APPENDIX N

TESTIMONY OF PHILIP ROSENBERGER

* * *

Direct Examination by Goodyear

[8595] Q. During the time you have been at Aviso, have you ever done any work for Motor Wheel? A. Yes. I joined the company somewhere around 1963 and within a couple of years I was assigned to the Motor Wheel account, which at that time was around 1966. I was working as an assistant account executive and shortly after that I became the account executive on the Motor Wheel account.

[8596] Q. And have you been in charge of the Motor Wheel account since that time? A. I've been in charge of it since that period of time.

Q. Okay. A. Currently my current position on the account is the account supervisor on the account.

Q. Okay. Have you been involved in developing and distributing advertising for Motor Wheel? A. I've been involved in all of their formalized marketing communications, which includes areas of the passenger car area. It included area in terms of the off-highway marketplace that they are into, into the truck area. I've been involved in their safety programs. I have done other internal communication program for Motor Wheel as well.

* * *

[8601] Q. Does Aviso put in more man hours per year on safety and warning efforts for Motor Wheel, or on pure product advertising for Motor Wheel? A. In terms of numbers of man hours, the company would put in more man hours into the safety programs just because of all the details and things that are involved in the program in safety.

* * *

[8610] Q. Now, in the course of handling for Motor Wheel it's both product advertising and safety and warning efforts, have you familiarized yourself with the safety and warning efforts of other entities and organizations concerning truck rims? A. Yes, I have. When I first got very deeply involved in the safety program, and, like I say, that was back [8611] in the early 70's, I got on the mailing lists of the associations such as the National Wheel and Rim Association and the Rubber Manufacturers Association. I also have done contact with several manufacturers to find out what they were doing in the area of safety and warning materials. I have even contacted and talked with the original equipment manufacturers in terms of, you know, what they are doing and put out and what they will put out.

At that point in time we found that very little was done in terms of material that we could find out there in the field. Like I say, that was ten or twelve years ago that that took place.

Q. Have you familiarized yourself with the efforts that Goodyear made out of Akron? A. Yes, I have.

* * *

[8613] Q. In the course of familiarizing yourself with Goodyear's efforts out of Akron, have you reviewed Goodyear documents concerning efforts they have undertaken in the warning and safety area? A. Well, let's go back a little bit. All the time that I've been with the company we have had the Motor Wheel account. Like I say, in 1964, Motor Wheel became a wholly owned subsidiary of Goodyear. At that point in time we started working just shortly after that with Goodyear Metal Products Division, which was the division that was making the specific rims for both flat base and drop center.

We had been involved with Motor Wheel which made the wheel portion of the product line, where they weld the disc into the center of the rim. But at that point in time we took over the whole line of wheels and rims and were handling their communications on those.

They sent us up absolutely boxes full of both photograph material, old warning material, old application catalogs, every conceivable thing you can imagine. There was something like 12 or 14 boxes of different material that came up for my review.

* * *

[8634] Q. Mr. Rosenberger, in the course of handling the safety and warning efforts on the Motor Wheel account, have you familiarized yourself with efforts undertaken by the RMA, the Rubber Manufacturers Association? A. Yes, I have. We got involved with the Rubber Manufacturers by securing a number of their materials and actually getting quantities of them and putting them in our warehouse and distributing them in the early portion of the program that I have referred to earlier.

Later on, we stopped the actual distribution of those materials ourselves, but referred people who would inquire about those materials that were available from that particular association, we would refer them to the association with name, address, so that they secure them direct from the association rather than using us as a distribution of that particular effort as well.

Q. And Goodyear is a member of RMA? A. Yes.

Q. Have you familiarized yourself in handling the safety and warning efforts in the Motor Wheel account with efforts undertaken by the National Wheel and Rim Association? A. Yes, I have. Likewise, with the National Wheel Rim and [8635] Wheel Association, they put out materials that we also distributed and then later on made people aware of, where they could get the materials direct from the National Rim and Wheel Association.

I might mention that a lot of the materials I'm talking about how in regards to layout, graphic layout, and photographs and this kind of stuff that is in those other materials, including material from OSHA which was provided by Motor Wheel, Goodyear through us -

Q. So I understand this, you worked with the NWRA, the RMA, OSHA, for instance, in providing pictures, language - A. Yes. We actually provided them in some cases with just photographic material of step by step processes involved.

In other instances we would provide them with a complete keyline. * * *

* * *

[8636] Q. Do I understand then on the NWRA rim and wheel manual, Goodyear Exhibit 253, the section there is simply the Goodyear-Motor Wheel safety manual put in a publication? A. This is a manual picked out of our safety materials and picked up almost exactly in most cases here in which they printed it in their particular publication along with the various other manufacturers in this particular piece. The OSHA regulation is also in this [8637] particular piece. We worked with the people at National Rim and Wheel when this piece was first under consideration through Motor Wheel, Bob Alcenius, who at the time was handling all the cataloging materials.

* * *

[8639] Q. Do you recognize Exhibit 209 as Goodyear-Motor Wheel publication? A. Yes, I do.

Q. Was your company involved in developing, formulating and publishing that exhibit? A. We were.

Q. Would you tell me what the date is of that Goodyear Exhibit 209? A. March, 1977.

Q. How was Goodyear Exhibit 209 distributed? A. We made this document available through our warehouse distributors. We actually sent it to the warehouse distributors including all of the sales people, principals, all the different locations. We made it available through truck dealerships and we made it available through our field engineers. Also on this particular piece I'm sure it was sent to Goodyear.

We were sending material that we would produce to the Goodyear people down there and keeping in touch with them on what they were doing in their [8640] programs as well.

* * *

[8644] Q. And what is the date on Goodyear Exhibit 39? A. 1973.

Q. And what is the date on Goodyear Exhibit 40? A. 1975.

Q. Okay. Does Goodyear Exhibit 39 and Goodyear Exhibit 40 have within them information concerning safety and instructions on handling rims, both single-piece and multi-piece rims? A. Both of these cover our complete line of rims, the single-piece and the multi-piece rims. And again, the material that's in here was supplied by Motor Wheel through us.

* * *

[8668] Q. Mr. Rosenberger, we left off yesterday talking about Goodyear's warning and safety efforts and their contacts and efforts through organizations such as the RMA, NWRA, and the DOT. I would like to pick up there again this morning. A. All right.

Q. I would like to show you what has been identified as Goodyear Exhibit 111 and Goodyear Exhibit 112. I ask you if you have ever seen Exhibits 111 and 112 before? A. I have seen both of these before.

Q. Are you familiar with those two exhibits? A. I am familiar with them.

Q. Are those safety and warning posters put out by the Department of Transportation? A. They are, both of them.

[8669] Q. Do you know approximately what time period of time frame those posters were first put out? A. These were put out in the mid to late 70's.

* * *

[8675] Q. Mr. Rosenberger, did the distribution of Goodyear Exhibits 111 and 112 continue throughout the 1970's, or was it just a one-shot deal? [8676] A. We had copies of those posters in our warehouse when we sent them out through the 1970's.

* * *

[8686] Q. Okay. Did you, with Mr. Bain, undertake a safety [8687] campaign for Motor Wheel? A. Yes, we did.

Q. Okay. Approximately when was that undertaken? A. That was in the early '70s.

Q. All right. A. It had—it had started under Mr. Spacke a little bit where we were doing various things in regard to safety, and it was—it was expanded and developed further under Mr. Bain.

Q. And had there been safety efforts prior to the formalized safety campaign? A. Yes. We had—as long as I can remember and had been on the account, we had always printed the mounting and demounting information and safety warnings and instructions in the backs of the application catalog, both all the catalogs on highway rims and off-highway rims, and we had printed the shop manuals on mounting and demounting, which also included safety and instructional material. We had done posters prior to that time.

Q. Okay. And we know there was distribution of the DOT posters, for instance, in 1973? A. Correct.

* * *

[8691] Q. Okay, and what is Goodyear Exhibit 202? A. Exhibit 202 is a bulletin put out by Mr. Landis Fields.

who was at that time the after-market manager. His job was to deal with the distributors, and he's announcing in this particular memo a rim safety exchange program to the distributors.

Q. Okay, is there a date on Goodyear Exhibit 202? A. It's November 1, 1977.

* * *

[8700] Q. Now, I show you what's identified as Goodyear Exhibit 172 and ask you to please identify that document for me. A. I can identify this. This is safety and warnings and instructions on rim and wheel handling.

[8701] Q. Okay, and was that publication prepared by your company? A. It was prepared by our company and it covered multi-piece and single piece rims.

Q. Okay, and what is the date of Goodyear Exhibit 172? A. The date on that is 1975.

Q. Okay, and was that prepared and distributed as part of Goodyear/Motor Wheel's warning and safety efforts concerning truck rims? A. Yes, this material was sent out to people. It was handed out at trade shows, it was given to truck dealers, and it was given to warehouse distributors. It went through—copies went to Goodyear for use in their program.

* * *

[8704] Q. Now, on Page 4 of Exhibit 172, Pages 4 and 5, are there photographs on those pages accompanying the instructions and warnings concerning the K-type rims? A. Yes, there are K-type rim photographs and copies with information on the correct and incorrect assemblies.

* * *

[8709] Q. Would you tell me, how many charts are there there? A. There are four charts here.

Q. Okay. And would you tell me what type of rim each chart deals with there? A. One chart deals with the mounting and demounting of Goodyear two piece and flat base semi drop center rims, and then it gives the types.

Another chart deals with how to properly mount and demount Goodyear three piece flat base rims.

Another chart deals with how to properly mount and demount Goodyear KB and KW type rims. Another one deals with how to properly mount and demount Goodyear drop center and super single rims.

Q. I show you what has been identified as Goodyear Exhibit 53 and Goodyear Exhibit 55. Would you identify those for the jury, please, Mr. Rosenberger? [8710] A. These are two of the posters that were in that exhibit, I think it was Exhibit 50.

Q. Okay. And Exhibit 55 deals with what type of rim? A. Exhibit 55 deals with single piece rims, the truck type and the super single type.

Q. Okay. So you had a separate poster for warning and instructions and safety on single piece rims? A. We had done all the posters at one time, but there was a separate poster for each type, basic type of rim.

Q. Okay. And Exhibit 53 concerns what kind of rim? A. 53 concerns the K, KW rim.

Q. And what is date on Exhibit 55, if it has one? A. 55 is 1971.

Q. And the date on Exhibit 53? A. 53 is 1971.

* * *

[8713] Q. As part of your continuing efforts, did you consolidate the five or four wall charts into a single one? A. Yes, we tried to put all the material that was on the five charts into a single wall chart.

Q. Okay. Let me show you what's been received as Goodyear Exhibit 217, and tell me if this is an example of how you handled each type of rim on one poster? A. Yes, that's an example of how we handled it on one poster.

* * *

[8717] Q. Who determines what is said in the safety warning, and instructional literature? A. The content of the warning literature comes from Motor Wheel/Goodyear. It also has our input into the thing with what we see in field practices.

Q. Do you work with engineer at Motor Wheel/Goodyear to determine the content of the literature?

[8718] MR. RISJORD: Are we speaking about the relevant time here or currently?

BY MR. MAY:

Q. In the last fifteen years, Mr. Rosenberger, have you worked with engineers at— A. (Interposing) In the times that I've worked with them, Motor Wheel's marketing communications people consult with all the engineering folks at Motor Wheel.

* * *

[8722] Q. Mr. Rosenberger, the various pieces of literature that we have here, is there a constant stream of this information that's distributed? A. We are developing information constantly and we are constantly mailing material out and distributing the material. It goes on literally daily.

* * *

[8726] The after market side of the business, which is the replacement side of the business, when products get bent, damaged, broken, worn out, the distributor side of the business sells a new product to that end user out there and we call that the replacement or after market side of the business, and about 10 percent of the product goes through there. These people are out there dealing at a level in which the product is being worked on or replaced, and so our safety and handling and warning information has to get out to these channels as well.

* * *

[8931] Q. So we're clear, Mr. Rosenberger, Exhibit 113 would indicate where in Minnesota these two posters were distributed in the early '70s (indicating)? A. Yes.

* * *

[8970] Q. If I may, Goodyear Exhibit 277, Mr. Rosenberger, the computer printout, how is this exhibit represented on Goodyear Exhibit 721? A. The locations that are on there are the records that we had prior to December of 1981 where we made shipments of the safety kit, and they are indicated by the red flags up there on the map.

* * *

Cross Examination

[9042] Q. * * * Do you agree that if a product is dangerous, it should be accompanied by warnings and instructions about the dangers? A. People should be given information on a product on how to properly use that product, and they should be given those instructions and warnings.

* * *

[9106] Q. But you did work on the safety exchange program, didn't you? A. I was involved in preparing a folder and communications information on that.

Q. Well, if the last KWX rim was made in 1958, you would agree that every single KWX out there was eligible in 1977, 19 years later, to be exchanged? A. Again, I'm not aware of the specific dates. I don't know on numbers of years.

Q. I want you to assume, because the jury knows this from testimony, that the last KWX was made in 1958. A. All right.

Q. It would therefore, assuming that was true, be eligible for your program, wouldn't it? A. It would have been eligible.

Q. All of them would have been, all KWX? A. They would have been eligible.

* * *

[9107] Q. * * * But you agree that it was an attempt to exchange the rim types described for safety? A. It was an attempt to get older rims out of service.

Q. For safety reasons, right? A. For safety reasons.

* * *

[9117] Q. So it's the practice of Motor Wheel to encourage the sale from the distributor's shelf or whatever of K rims, and at the same time you are attempting to remove them from the road for safety? A. No. We have an obligation to put into our catalogs, we have an obligation to tell people how to use those rims and how to mount and demount those rims, because once we have sold the rim to a distributor or on an International truck or something else and it runs 150,000 miles or five years or ten years, we have an obligation to continue to tell them how to use it.

* * *

[9163] Q. * * * [W]as the safety exchange program in its effort to get exchange of K rims, among others, successful? A. To my recollection, the exchange program - not just to exchange K rims but to exchange all multi-piece rims - did not achieve the results that we had hoped that it would achieve in terms of pulling old rims that [9164] should not be used out of service.

* * *

Q. The result is that it was a spectacular flop or failure. Isn't that correct? A. That is as I understand it.

Q. No rims were exchanged? A. I don't know if there were none.

Q. You don't know if there was one? A. I have - I've heard, like, four, but I - I don't know that.

Q. Four total rims in the United States of America and Canada. Right? A. Yes.

* * *

[9185] Q. The question of these things exploding and killing people and your client claiming that that is because they are uninformed, that is not a long-term problem? A. Well, we have taken the attitude in terms of the material that we have done—we haven't taken a haphazard, one-time approach of getting on TV or anything like that as a one-time approach. We have taken it as a long-term obligation that we have been doing year after year, day after day. It is a continuous educational process on warning and instructing.

* * *

[9247] Q. Do you agree that in the year 2000 there will still be young men, particularly, and young people that get injured and killed by Goodyear K rims, if the company that you work for continues along its present course? A. On any rims or any wheels, if they are not properly maintained or they are cracked or anything is wrong with them, if they can't recognize the danger signs, I am aware of the fact that there can be accidents.

Q. And there will continue to be on the basis of the [9248] present course of conduct? A. That's why it makes it more imperative that we continue to do what we are doing right now in terms of instructing and including all of this information in what we are doing.

* * *

[9252] Q. * * * Now, we have a problem I want you to help us with because we don't know what a key word in this sentence is, so I'm going to repeat it to you and then I'm going to ask you about it; all right?

"This proposed OSHA standard is the result of industry (wheel manufacturers) pressure on OSHA to promulgate a standard which will put the product liability onus on the people who service multi-piece rims wheels and hopefully minimize the manufacturers' exposure to product liability claims and actions arising out of multi-piece rim wheel failures and explosions resulting from improper servicing procedures."

Now, would you define the word "onus" for the jury? We're having trouble determining what that word means.

* * *

[9254] Q. Okay. Well, now identify for the jury and define for it the word "onus," o-n-o-s, what does that mean? * * *

BY MR. FLASKAMP:

Q. O-n-u-s. A. They are trying to put the responsibility on somebody else.

* * *

Recross Examination

[9333] Q. Well, whatever you want to call it, the documents that were prepared in 1979 to bring back in from people in the field back into the manufacturer, what do you call that? A. That was an exchange program.

Q. Exchange program. And you exchanged four rims with that program? A. I don't recall the specific number. I was not involved in the actual numbers. All I've heard is a very small number.

Q. I thought you said yesterday there were four rims that— A. Yes, four.

Q. Didn't you say that yesterday? A. That was the number I heard. I know that it was not successful in bringing in large quantities of rims.

* * *

APPENDIX O

TESTIMONY OF DONALD LEE WHITE

* * *

Direct Examination by Goodyear

[8412] Q. How did you learn your territory? When did you start your job and how did you learn the customers that were on that route? A. I started in September of 1974, and the man that had the territory before me was on there for 32 years, I believe it was, and I trained with him for four months.

Q. What was the reason for training with him during that period? A. To establish the territory and basically learn the product line and how things were done with—with our products.

[8413] Q. In your job responsibilities do you receive, or has Pioneer received warning or safety literature from Motor Wheel Corporation? A. Yes.

Q. Do you distribute that warning literature to your customers? A. Yes.

Q. What is the reason for doing that? A. Awareness of - of multi-piece rims, the mounting procedures on the charts, mounting and dismounting, I should say.

* * *

[8414] Q. Are Goodyear Exhibits 281 and 282 the types of literature which in December of 1981 or before you would have distributed to your customers? A. Yes.

Q. Do you distribute this safety literature in the normal course of your duties and responsibilities as a sales person for Pioneer Rim and Wheel? A. Yes.

* * *

[8415] MR. DOBBELS: Your Honor, at this time we would introduce into evidence Goodyear Exhibits 281 and 282.

MR. GODLEWSKI: I have no objection. I'd just like to know the dates of 281 and 282, if I may.

THE WITNESS: 1981 and 1980.

* * *

MR. FLASKAMP: Mr. White, did you ever deliver any of those catalogs to Remer Oil Company in the years of their - of their publication?

THE WITNESS: No, not that I'm aware of.

* * *

[8419] BY MR. DOBBELS:

Q. Mr. White, let me show you what has been marked as Goodyear Exhibit 217 and ask you if you recognize both the package and the material contained within it? A. Yes, I do.

Q. Could you identify what that is, Mr. White, for the record? A. This is a safety manual which contains the mounting procedures and safety material, reading material.

[8420] And this is a safety chart (indicating).

Do you want me to open it up?

Q. Why don't you look in it and see if you recognize it. I'll give you a hand in opening it. A. Yes. I recognize it.

Q. Okay. Could you please tell us briefly if you recognize having distributed these to your customers before December of 1981? A. Yes.

Q. Did you make these available to all of your customers? A. Yes.

* * *

BY MR. GODLEWSKI:

Q. Mr. White, did you ever drop any information that's part of the packet that is contained in Goodyear Exhibit 217 at Remer Oil Company, Remer, Minnesota?

* * *

THE WITNESS: No.

MR. GODLEKSKI: You never did?

[8421] THE WITNESS: No.

* * *

Cross Examination

[8451] Q. That safety information you have in front of you is generated by Motor Wheel Corporation, is it not? A. Yes.

Q. And you understand that to be a subsidiary of the Goodyear Tire and Rubber Company. A. Yes.

Q. Now, all that information first comes to Pioneer in Minnesota, is that correct? [8452] A. Yes.

Q. And then from Pioneer, your employer, it's given to the salesmen, one of whom is yourself, correct? A. Yes.

Q. So the origin and the - if we could draw a flow sheet it would be Motor Wheel to Pioneer, correct? A. Yes.

Q. And Pioneer to Don White? A. Yes.

Q. And then Don White to Don White's customers, or really Pioneer's customers? A. Pioneer's, yes.

Q. Now, what does it take to become a customer of Pioneer? A. Pioneer Rim and Wheel customers - the territory that I took over - there was established customers.

Q. This is 1974, correct? A. Yes.

* * *

[8456] Q. Your daily log sheets do not reflect that you ever dropped off any safety information at the Remer Oil Company, Dale Zorman's place of business in Remer, Minnesota; is that correct? A. Yes.

Q. We are talking about the relevant time period 1974 to 1981. A. Yes.

* * *

[8461] Q. Mr. White, I'm showing you what has been marked Plaintiff's Exhibit 3.1 and ask you whether or not you have a recollection of that being a gas station in Remer, Minnesota. Take a look at it. A. Could be.

[8462] Q. You see a service bay area door there, do you not? A. Yes.

Q. And there are some tires there also? A. Yes.

Q. Would this be a station that you would consider dropping off that safety information so it could get to employees servicing rims and wheels? A. No.

Q. Do you know how many service stations were in Remer, Minnesota, during 1974 to 1981? A. No.

* * *

Redirect Examination by Goodyear

[8475] Q. Are you familiar with a tire dealer that goes by the name of Itasca? A. Yes.

Q. Could you please tell me who that is? A. Itasca Tire is in Grand Rapids. They had also outside [8476] salesmen.

Q. Are they presently in existence? A. No.

Q. Were they in operation prior to 1981? A. Yes.

Q. Prior to 1981 had you delivered safety information to them? A. Yes.

* * *

Recross Examination

[8480] Q. Now, when you were driving through your territory in northern Minnesota, would you have occasion to see - I'm talking about the relevant time period here, 1974 to 1981. A. Yes.

Q. All right. You would have occasion to see, would you [8481] not, used K rims for sale? A. Well, your tire dealers have them for sale, yes.

Q. And these - by K rims, I'm referring to Plaintiff's Exhibit 1 [the Goodyear KWX truck rim which injured Dale Hodder] as an example, that is a split base rim. You recognize this as a Goodyear K rim? A. Yes.

Q. And you would see these for sale in tire shops in your area during the period of 1974 to 1981; correct? A. Yes.

Q. Would you drop off any of the safety information that you in front of you to all the shops that you saw selling these used K rims? A. Not necessarily.

* * *

APPENDIX P

CLOSING STATEMENT OF GOODYEAR COUNSEL

* * *

[13,794] I submit to you that there's been no failure of any warning in this case, no failure to warn because the warnings were there in the trade magazines, the warnings were there at Pioneer, and if Mr. Zorman had not dealt in junk parts that he found after the snow melted, if he bought parts, good parts that were serviceable parts, he would have gotten the warnings directly from the distributor also.

There's no failure to warn in this case because Dale Zorman ignored and said he would ignore what warnings were made available to him.

Now, let me go first to punitive damages in this case, and this is not a punitive damage case. [13,795] You're going to see in the instructions that punitive damages must be based upon clear and convincing evidence.

You're going to get a packet of instructions which is thicker than the verdict you have now in front of you. Clear and convincing evidence. There's a high standard of proof for punitive damages. It means that you have to have a firm conviction, a firm belief that Goodyear acted in willful indifference to the rights and safety of people like Dale Hodder in 1955 when it produced this rim, and there's clearly no evidence of that.

Goodyear has done everything it could do to make a good product, a tested product, a product that was absolutely safe if used correctly. Gerbeth has served on government committees, Goodyear has gone to OSHA. By the way, NHTSA went to OSHA, too, after investigating these rims and what was causing these accidents.

Goodyear got an OSHA standard passed that reduced the accident rate in this country 70 to 80 percent, 70 to 80 percent after the passage of the OSHA standard.

Goodyear has put out warning literature, [13,796] put out instructions, made safety films, shown and distributed in the State of Minnesota. There is no evidence of willful disregard of people's rights.

You know, a manufacturer can't control each and every workplace in this country, and there's a hundred thousand workplaces in this country. We can't hire and fire, we can't be responsible for training Dale Hodder, we can't be there every time a part time high school student is hired, 17 years old, to work in what Dale Zorman knew could be a dangerous occupation if you don't do it correctly. You can't be there.

That's why we saw to it that our government, federal government passed the OSHA standard, so that employers will have the obligation to train, something that Goodyear can't do.

You know, one point in Mr. Youngdahl's testimony, he tells you that training is the key. I asked him, "Now have you come across in your research findings by the federal government that proper training is the key to preventing accidents with truck rims?"

"Answer: I've read statements to that effect."

* * *

APPENDIX Q

(Filed July 25, 1986)

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

File No. 793068 N

Dale L. Hodder,
Plaintiff,

vs.

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants,

and

The Goodyear Tire & Rubber Company, an Ohio corporation, and Motor Wheel Corporation, an Ohio corporation,
Defendants and Third-Party Plaintiffs,

vs.

Remer Oil Company, Inc., a Minnesota corporation,
Third-Party Defendant.

SPECIAL VERDICT

1. Was the KWX truck rim defective and unreasonably dangerous because of its design?

ANSWER: Yes ...... No X

2. If your answer to question 1 was "yes," then answer this question:

   Was such a defective and unreasonably dangerous design a direct cause of Dale Hodder's injuries?

   ANSWER: Yes .... No ....

3. Was the Goodyear Tire & Rubber Company negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

   ANSWER: Yes X No ....

4. If your answer to question 3 was "yes," then answer this question:

   Was the Goodyear Tire & Rubber Company's negligence a direct cause of Dale Hodder's injuries?

   ANSWER: Yes X No ....

5. Was Motor Wheel Corporation negligent because it knew or reasonably could have discovered the danger involved in the use of the KWX truck rim, and the KWX truck rim was not accompanied by adequate warnings?

   ANSWER: Yes X No ....

6. If your answer to question 5 was "yes," then answer this question:

   Was Motor Wheel Corporation's negligence a direct cause of Dale Hodder's injuries?

   ANSWER: Yes X No ....

7. Was Remer Oil Company, Inc. negligent?

ANSWER: Yes X No ....

8. If your answer to question 7 was "yes," then answer this question:

Was Remer Oil Company, Inc.'s negligence a direct cause of Dale Hodder's injuries?

ANSWER: Yes X No ....

9. Was Dale Hodder negligent?

ANSWER: Yes .... No X

10. If your answer to question 9 was "yes," then answer this question:

Was Dale Hodder's negligence a direct cause of his injuries?

ANSWER: Yes .... No ....

11. If your answer was yes to questions 2, 4, 6, 8 or 10, then as to those questions that you answered "yes," answer the following:

Taking all of the fault that directly caused Dale Hodder's injuries as 100%, what percentage of fault do you attribute to each of the following:

ANSWER:

a) The Goodyear Tire & Rubber Company	42.5%
b) Motor Wheel Corporation	42.5%
c) Remer Oil Company, Inc.	15.0%
d) Dale Hodder	0.0%
Total:	100%

REGARDLESS OF HOW YOU ANSWERED QUESTIONS 1 THROUGH 11, YOU *MUST* ANSWER QUESTION 12:

12. What sum of money will fairly compensate Dale Hodder for his injuries?

Past:

Pain	$ 25,000.00
Disability	$ 750,000.00
Disfigurement	$ 100,000.00
Embarrassment	$ 50,000.00
Emotional Distress	$ 75,000.00
Past expenses for care and treatment	$ 147,463.00
Loss of earnings	$ 60,000.00

Future:

Pain	$ 10,000.00
Disability	$ 175,000.00
Disfigurement	$ 30,000.00
Embarrassment	$ 15,000.00
Emotional Distress	$ 20,000.00
Costs of live-in attendants, medical and dental treatment, rehabilitation, occupational, recreational, and physical therapies, psychological and family counseling, cognitive retraining, and behavioral remediation, medication and clinical testing, and similar expenses	$1,091,453.00

Loss of earnings	$ 820,000.00
Total Past and Future	$3,368,916.00

13. Is Dale Hodder entitled to an award of punitive damages from Goodyear?

ANSWER: Yes X No ....

14 If your answer to question 13 was "yes," then answer this question:

Amount of punitive damages: $12,500,000.00

15. Had the useful life of the KWX truck rim expired at the time of Dale Hodder's injuries?

ANSWER: Yes X No ....

16. If your answer to question 15 was "yes," then answer this question:

Was Dale Hodder negligent for failing to determine that the useful life of the KWX truck rim had expired?

ANSWER: Yes .... No X

17. If your answer to question 16 was "yes," then answer this question:

Was the negligence of Dale Hodder in failing to determine that the useful life of the KWX truck rim had expired a direct cause of his injuries?

ANSWER: Yes .... No ....

Signed: /s/ Warren W. Thompson
Foreperson

DATED: July 25, 1986.

IF FIVE-SIXTHS VERDICT, CONCURRING JURORS SIGN ON THE LINES NUMBERED BELOW:

1. .... 4. ....

2. .... 5. ....

3. ....

This Section To Be Completed by Court Clerk.

Jury Retires at 11:25 o'clock A.M., July 23, 1986.

Verdict Rendered at 3:33 o'clock P.M., July 25, 1986.

Filed: July 25, 1986.

By: /s/ John T. Richardson
Deputy Clerk

APPENDIX R

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Richard S. Slowes, being first duly sworn on oath, deposes and states as follows:

1. I am an attorney at law licensed to practice in Minnesota and am an Assistant Solicitor General for the State of Minnesota. From 1980 Until January of 1988, my duties and responsibilities included receiving and reviewing notices on behalf of the Attorney General when parties and lawyers challenge the constitutionality of an act of the legislature in any action to which this state or an officer, agency or employee of the state is not a party pursuant to Minn. R. Civ. P. 24.04, and Minn. R. App. P. 144.

2. I have reviewed all records of such notices in the Attorney General's office concerning *Dale L. Hodder v. The Goodyear Tire & Rubber Company, et al.* Hennepin County File No. PI 793-068; Appellate Court Nos. C3-87-419 and C2-87-511.

3. My review of the above-mentioned files included a search for all notices of constitutional challenges pursuant to Minn. R. Civ. P. 24.04 and Minn. R. App. P. 144, by or on behalf of all parties to this case.

4. The Attorney General's records do not reflect receipt of any notice of constitutional challenges by Defendants/Appellants Goodyear and Motor Wheel at the trial court level.

5. The only notice putting the constitutionality of any statute in issue by Defendants/Appellants Goodyear and Motor Wheel was at the appellate court level pursuant to Minn. R. App. P. 144. A copy of that notice is attached hereto and made a part hereof.

6. Affiant has read this Affidavit and believes it to be true to the best of his knowledge.

FURTHER YOUR AFFIANT SAITH NOT.

/s/ Richard S. Slowes
Richard S. Slowes
Assistant Solicitor General
State of Minnesota

Subscribed and sworn to before me this 18th day of May, 1988.

/s/ Barbara Grimes
Notary Public

(Seal)

STATE OF MINNESOTA
IN COURT OF APPEALS

Trial Court Case No. 793068
Appellate Court Case No. C3-87-419

Dale L. Hodder,
Respondent,

v.

The Goodyear Tire & Rubber Company,
and Motor Wheel Corporation,
Appellants,

v.

Remer Oil Company, Inc.,
Respondent.

NOTICE TO ATTORNEY GENERAL PURSUANT TO RULE 144 M. R. CIV. APP. P.

TO: Hubert H. Humphrey, III, Attorney General, State of Minnesota and Richard S. Slowes, Assistant Solicitor General, State of Minnesota, 515 Transportation Bldg., St. Paul, Minnesota 55155.

PLEASE TAKE NOTICE that on March 5, 1987, the Goodyear Tire & Rubber Company ("Goodyear") and Motor Wheel Corporation ("Motor Wheel") filed their Joint Notice of Appeal from a Judgment entered February 10, 1987, and an Order filed February 2, 1987, on which written notice of filing was served February 3, 1987. Also please note that on March 13, 1987, Goodyear and Motor Wheel filed their Joint Petition for Accelerated Review to the Supreme Court.

PLEASE TAKE FURTHER NOTICE that Appellants Goodyear and Motor Wheel intend to challenge the constitutionality of Minn. Stat. § 549.20 (1980) on its face and as it was applied by the trial court. The trial court's punitive damages instruction was premised on Minn. Stat. § 549.20 which explicitly allows punitive damages to be based on acts toward "others" (*i.e.* people other than Dale Hodder) in violation of the due process protections afforded by the Minnesota and United States Constitutions. The trial court applied Minn. Stat. § 549.20 in an unconstitutional manner in that punitive damages were allowed to be based on conduct unrelated to the underlying cause of action (*i.e.* not accompanying the 1955 KWX rim with a warning).

Dated: March 17, 1987

Dorsey & Whitney
By /s/ James B. Vessey
James B. Vessey (#112690)
Kelley R. Lorix (#145828)
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APPENDIX S

STATE OF MINNESOTA
IN SUPREME COURT

C3-87-419 and C2-87-511

Dale L. Hodder,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

The Goodyear Tire & Rubber Company et al.,
defendants and third party plaintiffs,
Appellants (C3-87-419),
Respondents (C2-87-511),
Pioneer Rim & Wheel Company,
Respondent,
Remer Oil Company, Inc., third
party defendant,
Respondent,

and

Pioneer Rim & Wheel Company, defendant
and third party plaintiff,
Respondent,

vs.

Acheson Tire Company, third party
defendant,
Respondent,
Arrowhead Equipment Company,
third party defendant,
Respondent,
Itasca Tire Company, third
party defendant,
Respondent.

MEMORANDUM IN SUPPORT OF THE GOODYEAR TIRE & RUBBER COMPANY'S TAXATION OF COSTS

The Goodyear Tire and Rubber Company ("Goodyear") prevailed in its appeal of the judgment rendered in favor of Dale L. Hodder ("Hodder"). Rule 139 of the Minnesota Rules of Civil Appellate Procedure allows the prevailing party in an appeal to be reimbursed for its statutory costs and disbursements. An appellant prevails if he secures a reversal or modification of the judgment from which an appeal is taken. *Servin v. Servin,* 345 N.W.2d 754, 759 (Minn. 1984); *Village of Blaine v. Independent School District # 12, Anoka County,* 121 N.W.2d 183 (1963). Goodyear appealed the award of $12,500,000 in punitive damages to Hodder. The Supreme Court sustained Goodyear's appeal and reduced the punitive damages award to $4,000,000.00. Goodyear is thus the prevailing party.

As a prevailing party, Goodyear is clearly entitled to be reimbursed for its statutory costs and the cost ($30,000) of the $5,000,000 supersedeas bond that it was required to file.

* * *

Dated: May 23, 1988

Dorsey & Whitney
By /s/ Tim Branson
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Timothy E. Branson (#174713)
Frederick A. McNeill (#184561)
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Telephone: (612) 340-2600
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APPENDIX T

Nos. C3-87-419 and C2-87-511

STATE OF MINNESOTA
IN SUPREME COURT

DALE L. HODDER,
Respondent (C3-87-419),
Appellant (C2-87-511),

vs.

THE GOODYEAR TIRE & RUBBER COMPANY
and MOTOR WHEEL CORPORATION,
Appellants (C3-87-419),
Respondents (C2-87-511),

vs.

REMER OIL COMPANY,
Respondent.

DALE L. HODDER'S ANSWER AND APPENDIX TO THE GOODYEAR TIRE & RUBBER COMPANY AND MOTOR WHEEL CORPORATION'S PETITIONS FOR REHEARING

* * *

ARGUMENT

I. THIS COURT WILL NOT CONSIDER ISSUES OR ARGUMENTS WHICH ARE RAISED FOR THE FIRST TIME IN A PETITION FOR REHEARING.

The rule governing the granting of rehearings in Minnesota was set down by this court in *Derby v. Gallup*.

5 Minn. 119 (1860), and later codified as Minn. R. App. P. 140.01. During the 120-year existence of this rule, the Minnesota Supreme Court has consistently held that an argument raised for the first time on petition for rehearing will not be considered. *Lentz v. Pearson*, 74 N.W.2d 662, 669-70 (Minn. 1956); *First National Bank of West Minneapolis v. Persall,* 125 N.W. 675 (Minn. 1910); *see also State v. Adams,* 89 N.W.2d 661 (Minn. 1958), *cert. denied*, 358 U.S. 826 (1958). In *Lentz*, this court denied a petition for rehearing stating: "[T]he points specified and relied upon in the petition for reargument appear for the first time in said petition. The case was not tried below or argued in this court on that theory. The matter, therefore, is not properly before us." *Lentz,* 74 N.W.2d at 669-70. Only if a question decisive of the case and *duly submitted* has been overlooked by the court will there be grounds for a rehearing. *See Wurdemann v. Hjelm*, 110 N.W.2d 150, 151 (Minn. 1961).

Most of the issues and arguments raised by Goodyear/Motor Wheel in their Petitions for Rehearing were neither argued nor preserved at the trial court or appellate level.

II. GOODYEAR/MOTOR WHEEL FAILED TO GIVE PROPER AND TIMELY NOTICE TO THE ATTORNEY GENERAL AND FAILED TO RAISE AND PRESERVE CONSTITUTIONAL ISSUES BOTH AT THE TRIAL AND APPELLATE LEVELS AND MISAPPLIED THE SEVENTH AMENDMENT.

Goodyear/Motor Wheel is asking this Court to consider and rule upon issues which have not been properly preserved because they failed to raise them below or because they failed to give timely and proper notice to the Attorney General of Minnesota pursuant to Minn. R. Civ. P. 24.04 and Minn. R. App. P. 144. Because these issues were not preserved, Dale Hodder asks this Court to acknowledge that these claims and arguments are untimely and are not properly before this Court.

A. Goodyear/Motor Wheel Failed To Give Timely And Proper Notice To The Attorney General Of The State Of Minnesota.

Goodyear/Motor Wheel may not question the constitutionality of the Minnesota Punitive Damages Statute, Minn. Stat. § 549.20 (1986), because they did not notify the Attorney General of their intention to do so at the trial court level pursuant to Minn. R. Civ. P. 24.04. A-1 to A-5. Minnesota Rule of Civil Procedure 24.04 provides:

> When the constitutionality of an act of the legislature is drawn in question in any action to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford him an opportunity to intervene.

Id.

Historically, this Court has been reluctant to consider the constitutionality of any state statute when proper notice has not been given to the Attorney General pursuant to Minn. R. Civ. P. 24.04. *Elwell v. County of Hennepin*, 221 N.W.2d 538, 545 (Minn. 1974); *see Hughes v. Patrick and Associates*, 220 N.W.2d 347, 348 (Minn.

1974) ("We dismiss the appeal for what we hold to be a failure to fully comply with the rules requiring notice to the attorney general in actions attacking the constitutionality of a statute . . . ."); *Johnson v. Village of Plymouth*, 180 N.W.2d 184, 185 (Minn. 1970) ("We do not reach the constitutional issues which were neither submitted to the trial court nor brought to the attention of the Attorney General under Rule 24.04, Rules of Civil Procedure."); *Campbell v. Glenwood Hills Hospitals, Inc.*, 142 N.W.2d 255, 260-61 (Minn. 1966) ("Minnesota Supreme Court refused to consider the constitutionality of statute because no notice had been given to attorney general pursuant to Minn. R. Civ. P. 24.04."); *In Re Leary's Appeal*, 136 N.W.2d 552, 560 (Minn. 1965) ("It was incumbent upon the appellant in this case, if she wished to raise the constitutionality of the statute, to serve the required notice upon the attorney general."); *Lowe v. Patterson*, 120 N.W.2d 313, 316 (Minn. 1963) ("The rules themselves require that all assignments challenging the constitutionality of statutes must be called to the attention of the Attorney General. Without such notice they may not be reviewed."); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn. App. 1988) ("Appellant has not raised the issue in a timely manner. In addition, the attorney general should have been notified in writing prior to conclusion of the trial in order to allow the opportunity for the state to defend the statute's constitutionality.").

In *Elwell v. County of Hennepin*, 221 N.W.2d 538 (Minn. 1974) a county failed to serve notice upon the Attorney General of its claim that Minnesota's green acres statute was unconstitutional. Although the *Elwell* court ultimately agreed to consider a constitutional question of which the attorney general had no notice, it did so because the issue had been specifically raised during the district court proceedings. *Elwell*, 221 N.W.2d at 545. "[T]he statute was argued by the parties in briefs submitted after the trial and was discussed at length in the trial court's memorandum." *Id.* at 542. Therefore, the question, having been considered by the trial court, was within the scope of the Supreme Court's review. *Id.*

The *Elwell* court noted that the "clear intent of the rule is to provide notice to the attorney general of an attack upon the constitutionality of a legislative act so that he may have the opportunity to defend its constitutionality." *Id.* at 544; *see In Re Leary's Appeal*, 136 N.W.2d 552, 560 (Minn. 1965); *Qualle v. County of Beltrami*, 420 N.W.2d 256, 258 (Minn.App. 1988). The *Elwell* court concluded that "because of the obvious salutary reasons for the rules, . . . we intend to require strict compliance with them and will ordinarily refuse to consider constitutional questions on appeal if there is a failure to give notice pursuant to the rules unless significant reasons appear for doing otherwise." *Id.* at 545.

Neither Goodyear nor Motor Wheel ever gave notice to Minnesota's Attorney General at the trial court level pursuant to Minn. R. Civ. P. 24.04. Attached at A-1 to A-5 is an Affidavit from Assistant Solicitor General Richard S. Slowes which verifies that he has reviewed the Hodder files in the Attorney General's Office and that there is no record of Goodyear/Motor Wheel ever having given notice at the trial court level of its intent to question the constitutionality of any Minnesota statute pursuant to Minn. R. Civ. P. 24.04. Goodyear/Motor

Wheel has offered no justification, for its failure to comply with Minnesota's Rules.[1]

The Minnesota Rules of Appellate Procedure have a parallel provision set forth in Rule 144. That Rule states:

> When the constitutionality of an act of the legislature is questioned in any appellate proceeding to which the state or an officer, agency or employee of the state is not a party, the party asserting the unconstitutionality of the act shall notify the attorney general within time to afford him an opportunity to intervene.

Id. "Notice must be served upon the attorney general pursuant to Minn. R. Civ. P. 24.04 *and* Minn. R. App. P. 144 when the constitutionality of an act of the legislature is questioned in any action to which the state is not a party." *McGuire v. C & L Restaurant Inc.*, 346 N.W.2d 605, 609 n.4 (Minn. 1984) (emphasis added). The only notice to the Attorney General given by Goodyear/Motor Wheel at the appellate level pursuant to Rule 144 is attached to and made part of the Affidavit of Richard S. Slowes. (A-4 to A-5.)

Goodyear/Motor Wheel's Rule 144 notice informs the Attorney General that Goodyear and Motor Wheel:

> [i]ntend to challenge the constitutionality of Minn. Stat. § 549.20 (1980) on its face and as it was applied by the trial court. The trial court's punitive damages instruction was premised on Minn. Stat.

---

[1] The Affidavit merely confirms what the record in this case demonstrates—no notice to the Attorney General by Goodyear/Motor Wheel at the trial court level and only one specific issue at the appellate level.

> § 549.20 which explicitly allows punitive damages to be based on acts toward "others" (*i.e.* people other than Dale Hodder) in violation of the due process protections afforded by the Minnesota and United States Constitutions. The trial court applied Minn. Stat. § 549.20 in an unconstitutional manner in that punitive damages were allowed to be based on conduct unrelated to the underlying cause of action (*i.e.* not accompanying the 1955 KWX rim with a warning).

Goodyear and Motor Wheel's belated notice to the attorney general questions the "unconstitutional manner" in which the trial court applied the Punitive Damages Statute. Never do Goodyear and Motor Wheel raise the arguments they are now asserting that the statute is unconstitutionally vague, that it allows the imposition of unconstitutionally excessive fines, that it violates their rights to a trial by jury or that the statute, in and of itself, violates their rights to due process of the law. The only issue raised in Goodyear/Motor Wheel's untimely notice to the Attorney General is that the trial court's jury instruction on punitive damages was an unconstitutional application of the statute.

Further any notice given by Goodyear/Motor Wheel pursuant to Minn. R. App. P. 144 is invalid because of their failure to preserve the issues at the trial court level pursuant to Minn. R. Civ. P. 24.04.

B. Goodyear/Motor Wheel May Not Raise Constitutional Issues For The First Time In Their Petitions For Rehearing Which Have Not Been Properly Preserved Below.

Defendants Goodyear/Motor Wheel are asking this Court to consider constitutional issues which were either not raised at all or were not adequately raised and preserved in the previous district and appellate court proceedings. In their Appellate Brief, the only constitutional cite is to Article I, § 10, the prohibition against *ex post facto* laws. In their Petitions for Rehearing, Defendant Goodyear cites five constitutional provisions and Defendant Motor Wheel cites two. While Defendants had ample opportunity to raise these additional constitutional arguments regarding punitive damages in their Answer, Amended Answer, during trial in their Motion for New Trial and in their Appellate and Reply Briefs, they did not do so. They now ask this Court to consider these new issues for the first time in their Petitions for Rehearing.

This Court has repeatedly held that it will not consider constitutional issues raised for the first time on appeal. *See Bianchi v. Nordby*, 409 N.W.2d 835, 839 (Minn. 1987); *Matter of Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981); *Elwell v. County of Hennepin*, 221 N.W.2d at 542; *Johnson v. Village of Plymouth*, 180 N.W.2d 184, 185 (Minn. 1970).

Minnesota recognizes that failure to raise issues at the trial court level prevents development of a record for the appellate court to review. *State Bank of Morristown v. Labs*, 275 N.W.2d 37, 40 (Minn. 1979).

The unconstitutionality or "illegality" of a statute is an affirmative defense pursuant to Minn. R. Civ. P. 8.03. Failure to plead an affirmative defense, without later amendment of the pleading, waives the defense. *Rehberger v. Project Plumbing Co., Inc.*, 205 N.W.2d 126, 127 (Minn. 1973); *Nodland v. Chirpich*, 240 N.W.2d 513, 517 (Minn. 1976). Goodyear Motor Wheel never asserted unconstitutionality of the Punitive Damages Statute as an affirmative defense in its Answer or Amended Answer and thereby waived their right to challenge the Punitive Damages Statute. The contention that a state statute is unconstitutional is an affirmative defense and must be so pleaded in the Answer. *Kewanee Oil & Gas Co. v. Mossmer,* 58 F.2d 711 (10th Cir. 1932).

In its Petitions for Rehearing, Defendants Goodyear/Motor Wheel raise several constitutional questions which were neither properly raised nor ruled upon in any of the previous proceedings in this case. Accordingly, Plaintiff Hodder asks this Court to acknowledge that the constitutional issues raised by Goodyear/Motor Wheel were not preserved below and are not properly before this Court.

C. The Seventh Amendment To The United States Constitution Does Not Apply To State Court Civil Actions.

In their Petitions for Rehearing, Goodyear/Motor Wheel misapply the Seventh Amendment to the United States Constitution. It is widely recognized in Minnesota and throughout the United States that the Seventh Amendment is a limitation on the federal government only and not on the states. That being true, it applies only to civil jury trials in the federal and not in state courts. *Carl v. De Toffol,* 25 N.W.2d 479 (Minn. 1946); *see Iacaponi v. New Amsterdam Casualty Company,* 258 F.Supp. 880, (W.D. Pa. 1966), *aff'd,* 379 F.2d 311 (3d Cir. 1967), *cert. denied,* 389 U.S. 1054 (1968). Accordingly, Goodyear/Motor Wheel has no right to a jury trial in this case based upon the Seventh Amendment to the United States Constitution.

* * *

II. THIS CASE WAS TRIED, DEFENDED AND SUBMITTED TO THE JURY ON THE CONTINUING DUTY TO WARN THEORY AND DID NOT VIOLATE GOODYEAR'S CONSTITUTIONAL RIGHTS.

Goodyear once again argues that the jury instruction concerning the duty to warn was invalid. This is not a proper subject in this Petition for Rehearing. This issue has been fully argued and briefed by the parties. Respondent Hodder's Brief at 23-28, 34-35. Goodyear and Motor Wheel's counsel recognized during the jury instruction conference that "Plaintiff has been arguing throughout this case that there is a continuing duty to warn . . . ." T. 12,873. Goodyear/Motor Wheel's motion for a directed verdict on the issue of continuing duty to warn was denied (T. 13,643), and the issue was submitted to the jury. T. 14,033-34.

Goodyear does not properly represent to this Court Hodder's position on JIG III 119 regarding Goodyear's duty to warn. Goodyear's counsel presents a quote from page 13,681 of the transcript regarding the warning question on the special verdict form as if it was a complete sentence, but omits the remainder of the sentence of Hodder's counsel's argument to the Court that JIG III 119 encompasses the continuing duty to warn theory upon which the case was tried:

> So we are not talking about a continuing duty to warn in the question, whereas I think the instruction is broad enough to include a continuing duty to warn.

T. 13,681.

The entire case on the warning issue was presented on the continuing duty theory by Hodder and was defended on a continuing duty theory by Goodyear and Motor Wheel. Hodder claimed this in his Complaint, Amended Complaint, and in his Trial Brief. RA. 141-49, 175, 200. All of Goodyear's proof on the warning issue showed that its warning efforts occurred after 1955 when the KWX rim in question was manufactured. Goodyear/Motor Wheel's witness, Phillip Rosenberger, testified for six days at trial as to Goodyear's warning efforts in the 1960's, 1970's and 1980's. T. 8,589-9,338.

Moreover, there is nothing in JIG III 119 (failure to warn instruction), which limits Goodyear's duty to warn to the time of manufacture. RA. at 317-18; T. 14,033-34. As this Court correctly observes in the *Hodder* opinion, the warning instruction was broad in scope, complied with all of the evidence submitted at trial, the jury could find that Goodyear had a duty, the breach of which was a direct cause of Dale Hodder's injuries.

As Plaintiff's counsel argued at the trial court level, the JIG III instruction included not only Goodyear's duty to warn, but also its duty to instruct in the safe use of the KWX truck rim. T. 13,681.

There is no evidence in this trial, and Goodyear cites none, for the proposition that safety warnings reached Remer. This issue has been previously argued by Goodyear and is not a proper subject in the Petition for Rehearing. Contrary to Goodyear's position, neither Zorman (Hodder's employer) nor Hodder ever received any warning or instruction concerning the specific dangers of the K-type rims or how to avoid those dangers. T. 2,877-80. Again, this issue has been fully discussed in Dale Hodder's Responsive Brief. The testimony was that if such information had been provided, Zorman would have displayed it at Remer Oil. T. 9,432-34. The citations to the transcript on page 6 of Goodyear's Petition do not stand for the proposition that "Remer testified it fully instructed Hodder in safety practices . . ." but rather cite to portions of Dale Hodder's direct testimony of various procedures he would go through while working for Remer Oil. Certainly there is no evidence that Dale Hodder received instructions or warnings concerning the specific dangers associated with the KWX truck rim. T. 2,738, 2,768.

Goodyear further argues that this Court has overlooked the failure to warn instruction which must be based upon negligence concepts. *See* Respondent Hodder's Brief at 23-28. The jury was fully instructed on negligence principles when it came to assessing Goodyear's duty to warn and instruct. The jury assessed Goodyear's "duty to give reasonable warnings" of dangers inherent or "reasonably foreseeable" in using the KWX truck rim. T. 14,033. Goodyear was under a duty to give "adequate warnings" and Goodyear is negligent for breach of this duty. Goodyear cites *Germann v. F. L. Smithe Machine Co.*, 395 N.W.2d 922 (Minn. 1986), *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272 (Minn. 1984), and *Bilotta v. Kelley Company, Inc.*, 346 N.W.2d 616 (Minn. 1984), *appeal after remand*, 358 N.W.2d 679 (1984) (review denied), which are all cases that are incorporated into the JIG III 119 instruction. T. 13,570.

Goodyear's argument here fails to recognize that all the evidence at trial, including its own offered proof, is directed at post-sale warning efforts and was not so narrowly focused to the time of sale so as to preclude jury consideration of Goodyear's continuing duty to warn and fully instruct in the dangers associated with the use of the KWX truck rim.

Goodyear's vague references to undefined constitutional rights, including Article I, § 4 of the Minnesota Constitution and due process principles under the federal and state constitutions, were not raised in its Answer or Amended Answer, were not briefed or argued at trial, were not raised in Goodyear's motions for a new trial and were not raised as issues on appeal by Goodyear.

III. PUNITIVE DAMAGES ARE PROPER WHEN PLAINTIFF HAS PROVEN BY CLEAR AND CONVINCING EVIDENCE THAT GOODYEAR'S CONDUCT VIOLATES THE STANDARDS SET FORTH IN MINN. STAT. § 549.20. AT THE SAME TIME, PLAINTIFF'S PROOF DEMONSTRATED GOODYEAR WAS NEGLIGENT WHEN IT BREACHED ITS DUTY TO WARN AND INSTRUCT, AND THIS NEGLIGENCE WAS A DIRECT CAUSE OF DALE HODDER'S INJURIES.

Goodyear re-argues the position it asserted in its principal and reply briefs. Goodyear mischaracterizes the basis of its liability in the *Hodder* case. Goodyear was held liable to Dale Hodder based upon the negligence principles on which the case was tried. These principles included duty, breach of duty, causation and damages. The jury was instructed on negligence principles, including Goodyear's duties and responsibilities to warn and instruct, Dale Hodder's duties and responsibilities, Remer's duties and responsibilities, together with a separate instruction on causation. RA. 296-330; T. 14,012-14,045.; *see* Respondent Hodder's Brief at 23-35.

Reference is specifically made to Respondent Hodder's Brief at page 26 which cites Goodyear's pre-trial stipulation that it had a post-sale duty to warn. RA. 247-48. Hodder also distinguishes *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876 (Minn. 1986) in his Brief. Respondent Hodder's Brief at 32-33. This Court has already reviewed the *Lewis* decision and distinguished it from *Hodder* on page 14 of the slip opinion.

Goodyear knows Plaintiff submitted the warning issue on negligence principles because Hodder elected to do this at the conclusion of the trial and prior to submitting the instructions to the jury. T. 12,652; 12,876.

IV. PUNITIVE DAMAGES WERE PROPER IN THIS CASE BASED ON THE STANDARDS SET FORTH IN MINN. STAT. § 549.20.

Goodyear raises constitutional issues in this section of its Petition for Rehearing for the first time. The constitutional issues discussed in this section were not raised as an affirmative defense in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint, were not briefed or argued to the trial court, were not raised in its post-trial motions, were not raised on appeal in Goodyear's principal or reply brief, and no notice of the issues was ever given to the Attorney General at either the trial or appellate court levels.

Goodyear's Petition for Rehearing cites *Bankers Life & Casualty Co. v. Crenshaw*, ... U.S.L.W. .... (May 16, 1988), and quotes dicta from Justice Sandra Day O'Connor's concurring opinion concerning the imposition of punitive damages. The *Crenshaw* court, however, dismissed Bankers Life & Casualty Company's appeal because the constitutional issues had not been properly preserved in the proceedings below.

In its argument that the imposition of punitive damages is unconstitutional, Goodyear relies heavily upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz,* however, held that states may define standards of liability for a publisher or broadcaster and permit recovery for punitive damages when liability is based on knowledge of falsity or reckless disregard of the truth. *Id.* at 347-49. There is no inconsistency between the *Gertz* opinion and this Court's analysis of the proof at trial in *Hodder* which demonstrated the willful indifference of Goodyear by clear and convincing evidence pursuant to Minn. Stat. § 549.20. Furthermore, in *Gertz,* the First Amendment issues were raised at the outset of the case, were fully briefed and reviewed both at the trial and appellate court levels prior to review by the United States Supreme Court.

V. PUNITIVE DAMAGES WERE BASED UPON STANDARDS AND PRINCIPLES OF LAW WHICH DID EXIST PRIOR TO DALE HODDER'S INJURIES IN 1981.

In this section Goodyear raises constitutional issues for the first time in its Petition for Rehearing which it did not raise in its Answer or Amended Answer; Goodyear did not raise these specific constitutional issues during motions in limine or during the trial and did not raise them on appeal to this Court. Goodyear also did not give notice to the Attorney General at the trial or appellate court levels on these specific issues. Accordingly, these issues were not preserved and are improperly raised for the first time this Petition for Rehearing.

A. Punitive Damages Were Based Upon Well-Recognized Negligence Principles And The Standards And Guidelines Set Forth In Minn. Stat. § 549.20.

JIG III 119, together with the other instructions as given to the Hodder jury, is based upon long standing negligence principles including the concepts of duty, breach of duty, causation and damages. T. 14,012-46. This is not a new or *ex post facto* application of negligence law.[2]

This issue was previously briefed and argued by the parties. See Respondent Hodder's Brief at 22-35, particularly at page 26 where Goodyear admits it has a post-sale duty to warn. RA. 247-48.

Of all the proof offered by Hodder on Goodyear's inadequate warning efforts, Hodder specifically cites to the Smith memo noted in footnote 6, page 12 of this Court's slip opinion in *Hodder*. Smith finds that the "conspicuous conclusion" of rim failures is that the majority are KB/KW/KWX series. RA. 26; *see also* T. 12,873. At trial, Goodyear's motions for a directed verdict on these issues were denied. T. 13,642-43.

Goodyear's premise that it has been convicted and fined for violating a law, citing JIG III 119, is incorrect.

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[2] In a law review article cited by this Court on page 9 of the slip opinion, Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U.L. Rev. 796 (1983), the author notes at page 814:

> . . . the ex post facto clause of the Constitution [of the United States] does not prevent state courts from applying new tort rules retroactively, and retroactive application is of course the strong common law tradition.

Schwartz at 814, citing, *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390-91 (1798); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14-20 (1976); *Nicholson v. Judicial Retirement and Removal Commission*, 562 S.W.2d 306 (Ky. 1978), *appeal after remand*, 573 S.W.2d 642 (Ky. 1978).

Hodder's common law tort action against Goodyear is not a "law" as defined in Article 1, § 10 of the United States Constitution. It is a common law duty, recognized by the trial court,[3] the breach of which the jury found caused Dale Hodder's injuries.

Dale Hodder has fully argued the application of Minn. Stat. § 549.20 to the facts of this case. Respondent Hodder's Brief at 28-35.

Goodyear derogates this Court's accurately detailed analysis when it complains that Goodyear's liability for punitive damage was upheld because of this "Court's ill-advised and unsupported judgments about the adequacies of Goodyear's warning distribution efforts which admittedly did *reach* Remer." Goodyear's Petition for Rehearing at 13. Goodyear cannot cite any document or any part of the transcript in this case to support its representation that warning materials reached Remer. The uncontroverted proof is to the contrary. There is no evidence that warnings of the K-type or KWX truck rim ever did reach Hodder, Zorman or anyone in Remer, Minnesota. Dale Hodder had never seen literature on the Goodyear K-type wheel (T. 2,738) and had never seen a Goodyear/Motor Wheel representative at the Remer Oil Company or Goodyear's film on the subject of the K-type rim. T. 2,768. Neither Zorman nor Hodder ever received any warning or instruction on the specific dangers of K-type rims or how to avoid those dangers. T. 2,877-79. If such information had been provided, Zorman would have displayed it at Remer Oil. T. 9,432-34.

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[3] *Germann v. Smithe Machine*. 395 N.W.2d 922, 924 (Minn. 1986).

There is overwhelming evidence supporting this Court's review of the record and its determination that a jury could find that Goodyear's failure to warn users of how to use the K-rim was supported by clear and convincing evidence of willful indifference and was a direct cause of Dale Hodder's injuries.

B. Punitive Damages Were Properly Based Upon The Guidelines Set Forth In Minn. Stat. § 549.20 Which Also Proved Goodyear Breached Its Duty To Warn And Instruct Pursuant To JIG III 119.

Goodyear in this subsection makes a vague reference to due process without citing either the state or federal constitution and it raises issues here for the first time in its Petition for Rehearing. No notice was given to the Attorney General on these issues either at the trial or appellate court levels.

This issue was fully briefed by the parties on appeal. See Respondent Hodder's Brief at 22-35. JIG III 119, as it was given to the jury in light of the proof at trial, was broad enough in its scope for a jury to find that Goodyear had a post-sale duty to warn,[4] the breach of which caused Dale Hodder's injuries and constituted negligence on Goodyear's part. This is not a standardless instruction and is an accurate statement of the law in the context of this case.

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[4] See page 26 of Respondent Hodder's Brief setting forth Goodyear's admission of its post-sale duty to warn. RA. 247-8.

VI. THE JURY INSTRUCTION ON PUNITIVE DAMAGES EMBODIED THE STANDARDS SET FORTH IN MINN. STAT. § 549.20 WHICH WERE STRICTLY APPLIED IN THIS CASE.

Once again, Goodyear raises constitutional arguments in this section of its Petition for Rehearing which were not raised as affirmative defenses in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint. Goodyear also did not give notice to the Attorney General at the trial court level on the constitutional issues raised in this section of its Petition for Rehearing. Goodyear's vague reference to due process here does not state which constitution it is relying upon.

This punitive damage argument raised by Goodyear has been fully briefed by the parties and Hodder refers this Court to his brief where he very specifically presents his argument as to the application of Minn. Stat. § 549.20 and JIG III 195 with reference to the proof in this case. Respondent Hodder's Brief at 28-35. The instructions as given to the jury, in light of all the proof at trial, were not as narrow as Goodyear now claims.

Contrary to Goodyear's statement at page 15 in its Petition, this Court did not make a "finding" that Goodyear was willfully indifferent in its warning distribution efforts—the jury made that finding.[5]

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[5] Goodyear does not cite a single page in the transcript for the proposition that Remer received warning information as it alleges in its Petition for Rehearing. Goodyear's claim that Hodder's employer would have disregarded warnings if he had received them is inaccurate. The unrefuted testimony is that neither Zorman nor Hodder ever received any warning or instructions of the specific dangers of K-type rims or how to avoid those dangers. T. 2,877-79. If such information had been provided, Zorman would have displayed it at Remer Oil. T. 9,432-34.

The cases cited by Goodyear for the proposition that the basis for the award of punitive damages violated its due process rights by "convicting one for crimes other than the one with which he is charged" do not support Defendant's assertion. *Gertz v. Robert Weich, Inc.*, 418 U.S. 323 (1974), is not applicable to the issues in *Hodder* and is distinguished at page 20, *supra*. The *Gertz* decision does not state that the imposition of punitive damages violates one's rights to due process.

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979), cited by Goodyear for the same proposition also does not support the contention that the imposition of punitive damages violates one's due process rights. The *International Brotherhood* Court held that punitive damages may not be assessed against a union that breaches its duty of fair representation by failing to properly pursue a grievance because the Railway Labor Act does not allow for the recovery of punitive damages—and not because the United States Constitution prevents the recovery of such damages.

VII. GOODYEAR REQUESTED THIS COURT TO REMIT THE PUNITIVE DAMAGE AWARD. THIS REDUCTION DOES NOT DEPRIVE GOODYEAR OF ITS RIGHTS TO TRIAL BY JURY OR DUE PROCESS.

Goodyear requested a remittitur of the punitive damage verdict in its Appellate Brief at page 50 and at oral argument. It may not now complain about the reduction granted by this Court. In fact, Goodyear relies upon this Court's remittitur when it claims to be the prevailing party on appeal. A-7; A-10; A-11.

It is the unique public aspect of punitive damages that invokes this Court's close supervision over such awards. *Hodder,* slip op. at 18. This Court did not order a new trial because all issues had been fairly litigated. A new trial on the issue of punitive damages may result in a higher award when the same evidence which established fault is again exhaustively presented to decide the egregiousness of that fault.

In *Stanger v. Gordon,* 244 N.W.2d 628 (Minn. 1976) this court reduced a punitive damage award without ordering a new trial:

> Mindful as we are of intruding on a function addressed almost entirely to the trial judge's discretion, we are collectively agreed that the punitive damages should be reduced to $7,500. We do not, as is generally the case, condition this reduction upon plaintiff's consent because we regard a retrial limited to the issue of punitive damages as impractical and a new trial on all issues is realistically unacceptable to plaintiff.

Id. at 632.

Hodder has already presented his analysis of the punitive damage issue. Respondent Hodder's Brief at 22-35. This Court applied a similar analysis at page 18 of the *Hodder* slip opinion.

The *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984) cited by Goodyear is neither binding nor persuasive precedent. *Shu-Tao Lin* was litigated in Federal Court and its decision was based upon the Seventh Amendment to the United States Constitution, which is inapplicable to state court proceedings. See pages 9-10, *supra.* The United States Court of Appeals, Seventh Circuit held that a reduction of *compensatory* damages by the federal district court judge was a violation of the Seventh Amendment's guarantee of a right to a trial by jury. Unlike *Hodder*, there were numerous errors that occurred in *Shu-Tao Lin*, which required a new trial. Both legally and factually, *Shu-Tao Lin* is not applicable to the issues raised in Goodyear's Petition for Rehearing or to any of the facts in the *Hodder* case.

Having urged this Court to remit punitive damages, Goodyear now alleges the reduction violates its right to a jury trial pursuant to the federal and Minnesota constitutions. The federal Constitution is inapplicable and this Court has already stated that remittitur of a punitive damage award is an appropriate exercise of its power.

Moreover, Goodyear may not seek relief and, after the Court *grants* it, claim that the reduction violates its jury trial rights.

VIII. THE ISSUES OF LIABILITY AND COMPENSATORY DAMAGES HAVE BEEN FAIRLY TRIED AND NEED NOT AGAIN BE EXHAUSTIVELY PRESENTED TO A JURY TO DECIDE ONLY THE EGREGIOUSNESS OF GOODYEAR'S FAULT.

In this section Goodyear asserts constitutional arguments that it did not raise in its Answer or Amended Answer to Plaintiff's Complaint or Amended Complaint, did not raise and present at the trial level, in its post-trial motions, or on appeal in its principal or reply brief.

Even though Goodyear requested a remittitur and claims to be the prevailing party on appeal, it nevertheless re-argues factual issues which have been exhaustively analyzed and reviewed by this Court following extensive briefings on the subject by Goodyear/Motor Wheel, Hodder and Remer Oil Company.

A. This Court Accurately Evaluated The Record.

Dale Hodder has already addressed the factual disputes that Goodyear once again raises in this section of its petition. Respondent Hodder's Brief at 1-10; 22-45. Goodyear fails to recognize that this Court reviews the evidence submitted by all the parties at trial from which a jury could make factual determinations in arriving at its verdict.

As this Court observes, there is ample evidence that Goodyear withheld accident reports from the DOT and misrepresented the reason for discontinuing K-rims. The unrefuted testimony is that the KWX truck rim was discontinued from production in 1962. T. 6324-26. Despite representations to DOT that "nothing really happened" with KB/KWX rim and that it was discontinued for commercial reasons, Goodyear engineer Gerbeth acknowledged to Goodyear defense counsel in 1971 that similar cases of explosive separation of KB/KWX rims were a significant factor in its discontinuance and that Goodyear was faced with the problem of warning users of K-rim problems. Hodder's Exhibit 500, RA. 1, 56, 80. Gerbeth also proposed to Goodyear management in 1971 to drop the K-KW rim for safety because it required an extra step to insure complete lock. RA. 8.

The documentary evidence submitted by Hodder at trial allowed for the factual conclusion by the jury that the KWX-KB rim was discontinued for safety reasons in early 1962. RA. 80. Aside from the factual testimony at trial, a jury certainly could draw the inference from Plaintiff's Exhibit 19 (RA. 1) that Goodyear engineers Burns and Gerbeth misrepresented to the DOT that the discontinuance of the KWX lightweight split rim was for commercial reasons and failed to disclose the accidents which precipitated that decision. Gerbeth acknowledges in Plaintiff's Exhibit 500 (RA. 80, 86) that, in addition to the *Huizenga* case being investigated by the DOT at the time, there were about 20 similar cases filed against Goodyear. Gerbeth admitted "quite freely that he was instrumental in inducing the company to stop producing the lightweight split rims in 1962" because "events similar to the instant case had occurred and this was a *significant factor* in discontinuing this product" RA. 86 (emphasis added).

In 1973, Goodyear/Motor Wheel engineer Smith acknowledged that information and warning literature on the K-type rim was not reaching the user. RA. 24; *Hodder*, slip op. at 12 n.6. When one looks at Goodyear's Exhibit 207 (A-35, A-61 to 62) in which Motor Wheel advertised Goodyear's K-type rims for sale four years after the Smith study, and six years after Plaintiff's exhibit 500 (RA. 80) one can appreciate that the total corporate conduct of Goodyear with reference to warning literature rises to the level of willful indifference.

Also, Goodyear fails to recognize that this Court explains in its opinion that, wherever it refers to Goodyear, this includes Motor Wheel, unless the context or text otherwise indicates. *Hodder*, slip op. at 10, n.5. Goodyear purchased the Motor Wheel Corporation making it a wholly owned subsidiary in 1964. T. 10,540, 10,545, 8,611. From 1964 through 1981, Motor Wheel's advertising agency took over the sale, promotion and warning and instructional efforts related to Goodyear rims and wheels, including K-type rims. T. 8,613-14.

B. This Court's Basis For Punitive Damages Is Consistent With Its Holding.

Goodyear here re-argues the factual issues which had been resolved against it by the jury, upheld by the trial court and reviewed by this Court. Goodyear's OSHA argument is inconsistent with this Court's review of the record. This Court recognizes that Goodyear's indifference rested not in its campaigning for OSHA regulations, but rather in its assumption that the OSHA program absolved it of pursuing a vigorous warning program of its own. *Hodder*, slip op. at 16 n.7. Goodyear also reargues evidentiary rulings of the trial court, affirmed by this Court on appeal and takes out of context the facts which demonstrate its willful indifference. *See* Respondent Hodder's Brief at 28-46.

IX. THE EVIDENCE AT TRIAL AMPLY SUPPORTS THE FINDING THAT GOODYEAR BREACHED ITS DUTY TO WARN AND INSTRUCT IN THE USE OF THE KWX TRUCK RIM.

In this section, Goodyear raises constitutional issues which it did not raise in its Answer or Amended Answer, did not argue or brief at the trial court level, in its post-trial motions, or its appeal to this court. These issues are not preserved on the record and are not proper subjects in Goodyear's Petition for Rehearing.

Goodyear once again argues facts that have been decided both by the jury, and trial court and have been reviewed by this Court in Goodyear's appeal. There is no justification for Goodyear's assertion that it somehow was held responsible for the actions or inactions of employees and representatives of its sole distributor in Minnesota—Pioneer Rim & Wheel Company. A-63. Neither Goodyear nor Motor Wheel made a claim against Pioneer, nor did they ask that the negligence, if any, of Pioneer Rim & Wheel Company be compared with that of Goodyear/Motor Wheel, Remer or Hodder.

The arguments advanced by Goodyear here have been fully briefed by Dale Hodder. *See* Respondent Hodder's Brief at 1-10, 22-35, 39-42.

Goodyear's reliance upon the OSHA standard, for the proposition that the standard greatly reduced rim accidents and therefore demonstrates lack of willful indifference (Goodyear's Petition for Rehearing at 25-26), is refuted by Goodyear's Answers to Interrogatories in the case of *Germanio v. The Goodyear Tire & Rubber Company,* Docket No. 87-3857 (J.F.G.) United States District Court, District of New Jersey (1988). Goodyear's Answers to Interrogatories with reference to other K-rim accidents detail 25 additional accidents since Dale Hodder's 1981 injuries. A-14 to A-34. This is exactly what was predicted by Goodyear's engineering statistics expert McCarthy when he testified in the Hodder trial that K-rim accidents will continue to occur into the 21st century on an increasing basis unless some counter measures are taken. T. 11,839-40.

Goodyear's conduct is more than negligent when it comes to warning and instructing how to use the KWX truck rim. As this Court recognized, there was sufficient proof (clear and convincing evidence) that Goodyear acted with willful indifference for failing to properly warn and instruct users how to use the KWX truck rim.

Finally, Goodyear never points out to this Court why $4 million is excessive under the Eighth Amendment and Article 1, Section 5 of the Minnesota Constitution. Goodyear never once argues that this award is excessive in relation to Goodyear's net worth, its culpable conduct or the damages sustained by Dale Hodder or any other criterion.

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